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**REPORTS**  
**OF**  
**CASES AT LAW AND IN CHANCERY**

**ARGUED AND DETERMINED IN THE**  
**SUPREME COURT OF ILLINOIS.**

---

**VOLUME 269.**  
**CONTAINING CASES IN WHICH OPINIONS WERE FILED IN OCTOBER,**  
**1915, AND CASES WHEREIN REHEARINGS WERE DENIED**  
**AT THE OCTOBER TERM, 1915.**

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**SAMUEL PASHLEY IRWIN,**  
**REPORTER OF DECISIONS.**

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**BLOOMINGTON, ILL.**  
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# JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

---

WILLIAM M. FARMER, CHIEF JUSTICE.

JAMES H. CARTWRIGHT,	}	JUSTICES.
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FRANK K. DUNN,		
GEORGE A. COOKE,		
CHARLES C. CRAIG,		
WARREN W. DUNCAN,		

ATTORNEY GENERAL,

PATRICK J. LUCEY.

---

REPORTER OF DECISIONS,

SAMUEL PASHLEY IRWIN.

---

CLERK,

CHARLES W. VAIL.



# TABLE OF CASES

REPORTED IN THIS VOLUME.

A	PAGE.
Ackerberg <i>v.</i> Dies. (Cooke, J.).....	392
Allen <i>v.</i> United States Fidelity and Guar. Co. (Carter, J.)..	234
Anderson <i>ads.</i> Miller. (Carter, J.).....	608
Anderson <i>ads.</i> People <i>ex rel.</i> (Cooke, J.).....	334
Art Institute of Chicago <i>ads.</i> Mitchell. (Craig, J.).....	381
Atwood <i>ads.</i> City of Chicago. (Dunn, J.).....	624

B	
Barthol. & Roesing Brewing Co. <i>v.</i> Modzelewski. (Craig, J.).	539
Barto <i>ads.</i> Conrad. (Dunn, J.).....	421
Bellinger <i>v.</i> Devine. (Cooke, J.).....	72
Bergman <i>ads.</i> Tomczak. (Dunn, J.).....	330
Bigelow <i>v.</i> Burnside. (Farmer, C. J.).....	324
Blair <i>v.</i> Faderer. (Cooke, J.).....	371
Bowers <i>v.</i> Evans. (Cartwright, J.).....	453
Burnside <i>ads.</i> Bigelow. (Farmer, C. J.).....	324

C	
Case <i>v.</i> Emerson-Brantingham Co. (Craig, J.).....	94
Casey <i>v.</i> Chicago Railways Co. (Cooke, J.).....	386
Casey, City of, <i>ads.</i> Lee. (Cooke, J.).....	604
Chicago, City of, <i>v.</i> Atwood. (Dunn, J.).....	624
Chicago, City of, <i>v.</i> Sullivan Machinery Co. (Cooke, J.).....	58
Chicago, City of, <i>ads.</i> Wayman. (Cooke, J.).....	27
Chicago Railways Co. <i>ads.</i> Casey. (Cooke, J.).....	386
Chicago, R. I. & P. Ry. <i>ads.</i> People <i>ex rel.</i> (Farmer, C. J.)..	513
Chisholm <i>v.</i> First Nat. Bank of LeRoy. (Craig, J.).....	110
Citizens Bank of Mukwonago <i>v.</i> Soden. (Cooke, J.).....	98
Cleveland, C., C., & St. L. Ry. <i>ads.</i> People <i>ex rel.</i> (Dunn, J.)	555
Conrad <i>v.</i> Barto. (Dunn, J.).....	421
Crabb <i>ads.</i> O'Day. (Cooke, J.).....	123

	PAGE.
<b>D</b>	
Davis <i>ads.</i> People. (Carter, J.).....	256
Decatur, City of, <i>v.</i> Schenck, and Scherer. (Watson, J.)....	181
Decatur, City of, <i>v.</i> Schlick, and Seibert. (Watson, J.).....	181
Devine <i>ads.</i> Bellinger. (Cooke, J.).....	72
Dies <i>ads.</i> Ackerberg. (Cooke, J.).....	392
Diesterweg <i>ads.</i> People <i>ex rel.</i> (Dunn, J.).....	602
Donnelly <i>v.</i> Emerson-Brantingham Co. (Craig, J.).....	94
Donough <i>v.</i> Garland. (Cartwright, J.).....	565
Dragovich <i>v.</i> Iroquois Iron Co. (Carter, J.).....	478

<b>E</b>	
East St. Louis Pub. Co. <i>ads.</i> Hagen Paper Co. (Farmer, C. J.)	535
Ellwood <i>v.</i> People <i>ex rel.</i> (Dunn, J.).....	518
Emerson-Brantingham Co. <i>ads.</i> Donnelly. (Craig, J.).....	94
Enders <i>v.</i> Muno. (Dunn, J.).....	422
Evans <i>ads.</i> Bowers. (Cartwright, J. ).....	453
Evans <i>ads.</i> Osmond. (Carter, J.).....	278

<b>F</b>	
Faderer <i>ads.</i> Blair. (Cooke, J.).....	371
Field & Co. <i>v.</i> Freed. (Farmer, C. J.).....	558
First Nat. Bank of LeRoy <i>ads.</i> Chisholm. (Craig, J.).....	110
Forte <i>ads.</i> People. (Cartwright, J.).....	505
Fox <i>ads.</i> People. (Craig, J.).....	300
Freed <i>ads.</i> Field & Co. (Farmer, C. J.).....	558

<b>G</b>	
Galpin <i>v.</i> City of Chicago. (Cooke, J.).....	27
Garland <i>ads.</i> Donough. (Cartwright, J.).....	565
Gerling <i>v.</i> Lain. (Farmer, C. J.).....	337
Gomel <i>v.</i> McDaniels. (Farmer, C. J.).....	362
Green <i>v.</i> Old People's Home of Chicago. (Craig, J.).....	134

<b>H</b>	
Hagen Paper Co. <i>v.</i> East St. Louis Pub. Co. (Farmer, C. J.).	535
Haskell <i>v.</i> Howard. (Farmer, C. J.).....	550
Hill <i>v.</i> Kimball. (Carter, J.).....	398
Hoffman <i>v.</i> Stephens. (Dunn, J.).....	376
Holliday <i>v.</i> Shepherd. (Carter, J.).....	429
Holmgren <i>v.</i> City of Moline. (Dunn, J.).....	248
Howard <i>ads.</i> Haskell. (Farmer, C. J.).....	550
Hubbart <i>ads.</i> Johnson. (Farmer, C. J.).....	532

<b>I</b>	
Iroquois Iron Co. <i>ads.</i> Dragovich. (Carter, J.).....	478
Israel <i>ads.</i> People. (Duncan, J.).....	284

J	PAGE.
Johnson <i>v.</i> Hubbart. (Farmer, C. J.).....	532

K	
Kersten <i>ads.</i> People <i>ex rel.</i> (Cooke, J.).....	597
Ketcham <i>v.</i> Ketcham. (Craig, J.).....	584
Keyes <i>ads.</i> People. (Cooke, J.).....	173
Kielczewski <i>ads.</i> People. (Cartwright, J.).....	293
Kimball <i>ads.</i> Hill. (Carter, J.).....	398
Kinsley <i>ads.</i> Metropolitan Life Ins. Co. (Carter, J.).....	529
Knox <i>ads.</i> Meily. (Dunn, J.).....	463
Krittenbrink <i>ads.</i> People. (Dunn, J.).....	244

L	
Lain <i>ads.</i> Gerling. (Farmer, C. J.).....	337
Lee <i>v.</i> City of Casey. (Cooke, J.).....	604
Lefens, Estate of, <i>ads.</i> People. (Dunn, J.).....	472
Lihme <i>ads.</i> People <i>ex rel.</i> (Dunn, J.).....	602, 351
Lloyd <i>ads.</i> Preston. (Watson, J.).....	152
Lueders <i>ads.</i> People <i>ex rel.</i> (Cooke, J.).....	205
Lynch <i>ads.</i> Stowell. (Craig, J.).....	437

M	
Maginn <i>v.</i> McDevitt. (Farmer, C. J.).....	196
Marion <i>ads.</i> Yockey. (Cartwright, J.).....	342
Matthiessen <i>ads.</i> People <i>ex rel.</i> (Cooke, J.).....	499
May <i>ads.</i> People. (Farmer, C. J.).....	417
McClung <i>ads.</i> City of Mt. Carmel. (Cartwright, J.).....	450
McDaniels <i>ads.</i> Gomel. (Farmer, C. J.).....	362
McDevitt <i>ads.</i> Maginn. (Farmer, C. J.).....	196
Meily <i>v.</i> Knox. (Dunn, J.).....	463
Metropolitan Life Ins. Co. <i>v.</i> Kinsley. (Carter, J.).....	529
Miller <i>v.</i> Anderson. (Carter, J.).....	608
Mitchell <i>v.</i> Art Institute of Chicago. (Craig, J.).....	381
Modzelewski <i>ads.</i> Barthol. & Roesing Brew. Co. (Craig, J.).....	539
Moline, City of, <i>ads.</i> Holmgren. (Dunn, J.).....	248
Moore <i>v.</i> Rowlett. (Craig, J.).....	88
Mt. Carmel, City of, <i>v.</i> McClung. (Cartwright, J.).....	450
Muno <i>ads.</i> Enders. (Dunn, J.).....	422

O	
O'Brien <i>v.</i> Estate of Rhembe. (Farmer, C. J.).....	592
O'Day <i>v.</i> Crabb. (Cooke, J.).....	123
Old People's Home of Chicago <i>ads.</i> Green. (Craig, J.).....	134
Osmond <i>v.</i> Evans. (Carter, J.).....	278

P	PAGE.
People <i>ex rel.</i> v. Anderson. (Cooke, J.).....	334
People <i>ex rel.</i> v. Chi., Rock Isl. & Pac. Ry. (Farmer, C. J.)..	513
People <i>ex rel.</i> v. Cleve., Cin., Chi. & St. L. Ry. (Dunn, J.)..	555
People v. Davis. (Carter, J.).....	256
People <i>ex rel.</i> v. Diesterweg. (Dunn, J.).....	602
People v. Estate of Lefens. (Dunn, J.).....	472
People v. Forte. (Cartwright, J.).....	505
People v. Fox. (Craig, J.).....	300
People v. Israel. (Duncan, J.).....	284
People <i>ex rel.</i> v. Kersten. (Cooke, J.).....	597
People v. Keyes. (Cooke, J.).....	173
People v. Kielczewski. (Cartwright, J.).....	293
People v. Krittenbrink. (Dunn, J.).....	244
People <i>ex rel.</i> v. LaSalle Street Tr. and Sav. Bank. (Dunn, J.)	518
People <i>ex rel.</i> v. Lihme. (Dunn, J.).....	602, 351
People <i>ex rel.</i> v. Lueders. (Cooke, J.).....	205
People <i>ex rel.</i> v. Matthiessen. (Cooke, J.).....	499
People v. May. (Farmer, C. J.).....	417
People v. Purcell. (Cooke, J.).....	467
People v. Richardson. (Dunn, J.).....	275
People <i>ex rel.</i> v. Sergel. (Farmer, C. J.).....	619
People v. Union Elevated R. R. (Craig, J.).....	212
Preston v. Lloyd. (Watson, J.).....	152
Price v. Solberg. (Carter, J.).....	459
Purcell <i>ads.</i> People. (Cooke, J.).....	467

## R

Rhembe, Estate of, <i>ads.</i> O'Brien. (Farmer, C. J.).....	592
Richardson <i>ads.</i> People. (Dunn, J.).....	275
Rowlett <i>ads.</i> Moore. (Craig, J.).....	88

## S

Scheets <i>ads.</i> Thorworth. (Carter, J.).....	573
Schenck <i>ads.</i> City of Decatur. (Watson, J.).....	181
Scherer <i>ads.</i> City of Decatur. (Watson, J.).....	181
Schlick <i>ads.</i> City of Decatur. (Watson, J.).....	181
Seibert <i>ads.</i> City of Decatur. (Watson, J.).....	181
Sergel <i>ads.</i> People <i>ex rel.</i> (Farmer, C. J.).....	619
Shepherd <i>ads.</i> Holliday. (Carter, J.).....	429
Shriver <i>ads.</i> Turney. (Craig, J.).....	164
Soden <i>ads.</i> Citizens Bank of Mukwonago. (Cooke, J.).....	98
Soden v. Claney. (Cooke, J.).....	98
Solberg <i>ads.</i> Price. (Carter, J.).....	459
Stephens <i>ads.</i> Hoffman. (Dunn, J.).....	376
Stowell v. Lynch. (Craig, J.).....	437
Sullivan Machinery Co. <i>ads.</i> City of Chicago. (Cooke, J.)...	58

T		PAGE.
Thorworth <i>v.</i> Scheets. (Carter, J.).....		573
Tomczak <i>v.</i> Bergman. (Dunn, J.).....		330
Turney <i>v.</i> Shriver. (Craig, J.).....		164
U		
Union Elevated R. R. <i>ads.</i> People. (Craig, J.).....		212
United States Fidelity and Guar. Co. <i>ads.</i> Allen. (Carter, J.).		234
V		
VanZanten <i>v.</i> VanZanten. (Farmer, C. J.).....		491
W		
Wayman <i>v.</i> City of Chicago. (Cooke, J.).....		27
Y		
Yockey <i>v.</i> Marion. (Cartwright, J.).....		342





## MEMORIAL SERVICES

HELD IN THE SUPREME COURT OF ILLINOIS ON THE DEATH  
OF THE HON. ALONZO K. VICKERS.

---

On Monday, April 19, 1915, at three o'clock in the afternoon, which hour had been set apart for the purpose, the following proceedings were had:

MR. CHIEF JUSTICE CARTWRIGHT:

This hour has been set apart for the purpose of commemorating the life and service of the late Justice Alonzo K. Vickers. A memorial is to be presented by Mr. L. O. Whitnel, a member of the St. Clair County Bar Association.

MR. L. O. WHITNEL:

*May it please the court*—The bar associations of St. Clair county and the city of East St. Louis, where lived Justice Vickers, made and passed resolutions in memory of him. I have been requested by and on behalf of the associations to submit these resolutions to this honorable court. They are as follows:

“Whereas, the bar association of St. Clair county feels deeply the loss, through the solemn avenue of death, of our brother, Justice Vickers; and whereas, for a period of more than a quarter of a century Justice Vickers rendered devoted, consistent and distinguished service to the people of this commonwealth as a member of the circuit, Appellate and Supreme Courts, and was at all times an able and earnest devotee of sound law and its fearless and upright administration, and likewise ever the sturdy and able advocate of purity and faithfulness in the administration of govern-

ment, and as a citizen he was just, charitable and public spirited, a believer in and advocate of the higher ideals in all lines of life:

*"Therefore be it resolved* by the members of the St. Clair County Bar Association, that in the death of Justice Vickers our county, our State and the profession have suffered a great and enduring loss; that his family is deprived of a loving, kind, indulgent husband and father; that his friends have lost an earnest, faithful and ever worthy friend and his community an influential and trustworthy citizen.

*"Resolved further,* that the judiciary of this great State in his departure loses one of its ablest, safest and most profound expounders of the law, the legal fraternity one of its safe directors and guides, and this association one of its wisest counselors and most faithful members.

*"Resolved further,* that we feel and appreciate the great loss occasioned by the passing away of this self-sacrificing and devoted man, and that we extend to his widow and children the sincere sympathy of this association.

*"Be it further resolved,* that a copy of these resolutions be presented to the city court of the city of East St. Louis, the circuit court of St. Clair county and the Supreme Court of Illinois; also a copy thereof to the family of the deceased."

*May it please the court*—We come to you to-day on a mission filled with sadness. It is such as stirs anew sorrow for you and opens afresh an avenue of grief for us; and yet that which occasions the gloom could not be averted, and we are tearfully thankful that it is not a task to speak the praises of the honored dead.

In the year 1853, just at a time when great agitation was rife and troublesome questions confronted the country,—a day when superb statesmanship was exerting its influence to pacify the stern and growing demand for legislation to expel human slavery from our borders and when prayers were offered to postpone severance of this nation,—away down in that part of Illinois designated Egypt, in the foot-hills near the Ohio and at a place overlooking old Fort Massac, Alonzo K. Vickers was born. The home that welcomed him was indeed an humble one,—a lowly cabin, upon a poor and meagerly equipped farm consisting of a few acres. His parents, pioneers, had joined other sturdy and noble people in the

work of developing a new country, and this undertaking was attended with hardships and privations, in which this home had in full-rounded measure its portion. Those were times that tried the steel of men and the patience of women and tested the metal of boys. There is a kind of romantic grandeur in viewing such life from afar. The little cabin in the clearing, surrounded by the primitive forest; the crude pole-barn, where the one horse and the crumpled-horned cow are kept; the faithful dog that keeps at bay the wolves and protects the poultry from the attack of the cunning fox; the tired, worn-out father, who with axe and fire makes war on the dense timber, extending the clearing; the good mother, with loom and wheel in the single room by the open fire, working the while and combining her well known lullaby with the motion of the box-cradle in which her little one sleeps. All this well furnishes a theme attractive to the poet; but to be born there, to live there, to join in the struggle and meet such stern realities, is to pass through a crucible which never failed to separate the gold from the dross. In the very midst of such surroundings was passed the childhood of Justice Vickers.

The war of the rebellion came upon the country when our friend was just past seven. He well remembered the enlistment of his father and his elder brother, and most vividly described his childish feeling as they went away, leaving behind his weeping mother. I have heard him relate the story of his visits to Fort Massac, where these relatives were in training. How his faithful mother, with him behind her, rode a horse to the camp, carrying an old feed basket filled with home-cooked bread, ginger cakes and doughnuts, to distribute among the soldier boys. It is no wonder that the bugle sound and trumpet blast aroused in him a high sense of patriotism, for he had learned the meaning of their call amid the real scenes of a cruel insurrection. The situation thus created cast upon him burdens and cares far beyond those usually assumed by boys of his age. Of necessity, such labor as he could perform was required in assisting his mother.

In those days in that community educational facilities were only apace with general conditions. The little log school house, with its scant equipment, its one teacher for all grades, the blue-backed speller, Harvey's Grammar, Ray's Arithmetic, and the few books accessible, constituted the opportunity for an education;

and this was laden with the drudgery of work morning and evening, after and before the long walk to and from this seat of learning. It was in such a school, amid such surroundings, that our deceased friend, as a child, commenced the search for knowledge. His experience, coupled with his achievements, presents a strong argument in support of his contention that privation and hardship in youth are altogether more of a blessing than a curse to a boy, and that they build the sinews of self-reliance and determination, which cannot be overcome or conquered by opposition in the battle of life.

Having spent the allotted time in the country school young Vickers arranged to attend school at Metropolis, the county seat. He later taught in the country schools, at the same time prosecuting the study of law. Judge McCartney tendered him the use of his office and became his preceptor, and this kindness was never forgotten by the student, who, with a zeal self-sacrificing, later rendered effective aid to this friend of his youth.

It is almost impossible to describe the real experience of a young man destitute of means, scantily clad, measuring the way from a meagre education throughout those three long years to the time when he receives the license of this court authorizing him to practice the profession of law. Only he who has had the experience can appreciate the task. The long hours of study; the floor-pacing, mingled with clouded effort to comprehend; plodding through Blackstone, Kent, Chitty, Greenleaf, Parsons, Pomeroi, Bishop, and other law books, with repeated visits to Bouvier; the reading of statutes and Moore's Criminal and Civil Law, and ever anxiously relying upon Puterbaugh for forms; and all in the presence of that ghost, the landlord, who is waiting for board and room money at the close of the week. Even these embarrassments are not all, for the limited wardrobe is becoming more and more faded and worn, and the student is face to face with the duty of foregoing study to do manual labor in order to procure the indispensable necessities of life. In such case it is with sore regret that he leaves the books and goes to the shop or field, but the return is attended with joy.

Such was the stony pathway over which our friend passed with honor, patience and determination in reaching that station, in 1882, where he passed the bar examination and was admitted

to practice. No doubt he dreamed of universities and colleges. In his vision were great schools of law afar off, beyond his grasp, and in that day, as after, he had profound respect for these and those who used them, but it is not to his discredit to say that his first entry over the threshold of a law college was for the purpose of delivering a lecture on constitutional law. It would be expected that he who had passed through such privations from birth to manhood, and from young manhood to the forum of his chosen calling, would bear the imprint of seriousness.

Having received authority to practice his chosen profession, Judge Vickers looked for a field of labor and selected as such the little city of Vienna,—the county seat of the county adjoining the county of his birth. There he was confronted with the opposition furnished by a strong, active bar made up of skilled lawyers,—fighters,—who never failed to appear with well prepared briefs, supported by determination and zeal. But such only added zest to the well-known “starving period” through which every young lawyer must pass. However, our friend was undaunted. He was himself a fighter. He knew not failure, and had learned the lesson embraced in the old adage, “Where there is a will there is a way.” He opened an office and devoted himself earnestly to the work necessary to transact the business tendered him. He also found time to edit a newspaper there. That paper is remembered yet in that city. It reflected the character of its editor. Bravely it recorded his convictions upon public questions. Brooking great opposition and at the risk of making lasting enemies he printed at the top of the editorial page the motto, “Hew to the line, let the chips fall where they may,” and from thence until now there has been no question but that the first editor of that paper religiously lived up to that motto. Quickly, so to speak, his ability and worth were recognized, and ere long those in need of legal services sought him. He soon afterwards became associated with Judge Spann under the firm name of Spann & Vickers, and later was associated with George B. Gillespie under the firm name of Vickers & Gillespie. This firm continued until 1890. He served as city attorney of his home city, and his services in this position gained for him the reputation of being a fearless, honest as well as most capable public official. In 1886 he was elected to the Illinois legislature, where he at once forged to the front as one of

the leaders of the house. In 1891 he was elected to the circuit bench, and here commenced his career as a jurist. Prior to this he had been a devout student of the law. As a practitioner he was a man of marked ability. He cherished the memory of many important cases in which he had appeared. He tried cases with such lawyers as Duff, Allen, Green, Inscore, Linegar, Lansden, Spann, Gregg, Damron, and a score of other sages of the bar, and all recognized him as an adversary worthy of their keenest wit, knowledge and skill.

It would be error to assume that at the time Justice Vickers was elevated to the circuit bench he was uneducated. It is true that in his youth the force of circumstances denied to him school facilities and that there was but scant aid tendered him in his efforts to attain an education. In measuring his capacity and knowledge at the time he was elected circuit judge, however, we must take into account the character, disposition and determination of the boy and the man, and we must not forget that wealth, colleges and universities are not indispensable requisites in acquiring knowledge. Such are only aids. With those, alone, learning does not come to him in whose reach they are, and without them a very thorough education may be acquired.

Justice Vickers, when a boy, was zealously anxious to succeed. He was physically strong and robust. He realized his situation. He understood the obstacles in his road and the difficulties confronting him. Even then he seems to have formed the firm determination to overcome and conquer those things which stood in his way. It was said of him that he did not like menial labor, and this furnished a basis for the belief entertained by some that as a boy he was not industrious. Such is a mistake. He was, indeed, a most industrious and untiring worker. He eagerly read books,—all the books he had access to,—and his thirst for knowledge never ceased. It is also true that he early formed the habit of thoroughness, and this trait was permanent with him. He was fortunate in possessing a retentive memory and a strong analytical mind, combined with the capacity for clearly expressing his thoughts. He was quick of comprehension. He was also liberal in the matter of inviting discussion and was a good listener as well as a forceful advocate. While the love of the law was ever his favored theme, yet he was interested in the old and new things



in science. He loved the stars, and possessed, in a general way, a knowledge of astronomy. He likewise was interested in flowers and plants and knew much of botany. He could discuss in an interesting way animal life,—the habits, home and customs of the inhabitants of the forest and stream. He was well versed in history and geography, and loved dearly the biographies of great men who had rendered service to mankind. He was a student of statecraft. He was well informed in the matter of government, well grounded in a knowledge of the different forms of government, and knew thoroughly the history of parties and party principles in his country. At the age of thirty-eight, when his judicial career commenced, he was recognized as a leader in his profession. Not only did he stand in the front rank as a lawyer, but he was easily the greatest, most logical and eloquent political campaigner that rendered service to his party in southern Illinois. In politics he was a partisan republican, strong and uncompromising. He espoused the cause of his party fearlessly, openly and ably. He believed in fighting to the finish, but never did he seek undue advantage. In like manner he was devoted to the cause of christianity. He was not a doubter. He had none of the misgivings of the skeptic. He felt more than certain,—even doubly secure,—in his religious convictions. He was among those who believed that the inspiration of the gospel, the spiritual endowment of Jesus, salvation for man and a future existence were established and indisputable. He called every fact in science, every discovery, all the myriad phenomena of nature, with history, ancient, mediæval and modern, and in convincing order presented all as establishing the monumental certainty of man's future existence. He was devoted to his church, and those who were close to him know of the sacrifices he made for its support.

Thus known and equipped, twenty-four years ago, at the age of thirty-eight, he whose loss we mourn entered upon his duties as judge of the circuit court in the first judicial district. Over this court for fifteen years he presided. He held circuit court not only in his own district but in many counties in the State, from Cairo to Chicago, and was known as an able, accurate and honest presiding judge. Having tried many cases in the circuit court where he presided, I can bear witness that his judicial temperament was such that as a judge he knew neither friend nor foe.

During three and one-half years of the period of his service as circuit judge he served as one of the justices of the Appellate Court. His assignment by the Supreme Court to the Appellate Court was a well deserved recognition of his eminent services on the circuit bench, and he most gratefully appreciated the appointment. In this position at Ottawa he was associated with able jurists, and the record he made there appears in many opinions of the Appellate Court, which constitute enduring evidence of his ability. There, as elsewhere, he devoted himself assiduously to the work necessary to the proper performance of his duty. I think it may be said of him that he thoroughly understood and comprehended the meaning of a selection to a public position. He realized that such selection added, instead of diminished, responsibility and labor, and with this high conception he accepted public office.

In June, 1906, Judge Vickers was elected one of the justices of this eminent court. Prior to that time the First Supreme Judicial District of Illinois had been represented here by none save able and learned judges. It had to its credit such men as Breese, Koerner, Mulkey, Baker and Boggs, all of whom had served on this court with great credit and ability. To succeed these great men and preserve in its strength and grandeur the reputation they had established for the district was a task that fell to the lot of our dead friend. He realized that this undertaking was not easy of accomplishment. He did not halt in the presence of or on account of the magnitude of this work but approached it with the determination to do well his part. That the work would be arduous and unceasing he knew, but he was acquainted with work. He was neither ashamed nor afraid of labor. He had the capacity for judicial toil, and those of you who served with him here know better than others how well he performed his duties as justice of the Supreme Court. For almost nine years he devoted his entire energies, working long hours during vacation that he might render an accounting to the people of this great commonwealth through the decisions prepared by him. That he was an able, industrious member of this distinguished court is the judgment of the bar and the people of this great State. He well preserved, maintained and handed to his successor, unsullied, the great reputation of those who had served before him, to which were added in rounded measure the strength and wholesomeness resulting from

his labor. You who served with him know with what fealty and fidelity he loved and honored you. To him the great future and reputation, the honor and the good name, of the Supreme Court of Illinois were as sacred as his life. You who served with him know better than I his deep devotion to and unlimited affection for the members of the court. To each of you his heart went out as to a brother, and he was ever ready to lend his energies and his aid to do all that could be done in order to reach a righteous decision of every case. The record of his labors on this court will be found in the printed volumes of the Reports, and hence his record as a justice of the Supreme Court has become fixed and established as part and parcel of the history of this commonwealth. His friends and the people of the great district from which he came are distinctly proud of that record. It is worth far more than glittering gold, is more lasting than wealth, and has attached to it a value as stable and continuing as the mountains themselves.

It has been said by a friend that from his birth to his death Justice Vickers lived in a caldron of opposition. While we do not agree literally, nevertheless it is true that his aspirations and his progress politically were resisted at every step by organized opposition. This is not to his discredit. It speaks in most potent language his merit and strength, and I am proud to say that his endorsement was by a voice from the source of government. However, it is most gratifying that at the close, when he properly sought an endorsement and approval of his eminent services here on this great court, there was no opposition.

Judge Vickers was poor in this world's goods. Wealth, dollars, property, accumulation, were not his forte. He knew but little of the art of trade. He lived in a greater zone,—in an intellectual vineyard,—and there he became so absorbed and enveloped that he could not give time to the mastery of finance. It can be truthfully said that he never neglected his public duty in the effort to increase his personal holdings, and herein those he served owe him an additional debt of gratitude. He was in the highest sense public spirited. He was always ready to aid in the promotion of every good work in the upbuilding of his city and his country, and never failed to fearlessly and openly espouse the cause of such progress. He was a lover of music, oratory, art and litera-

ture, and believed that through these the world was growing constantly better.

Judge Vickers left surviving him his widow—she whom in his young manhood he had wooed and won and who for more than thirty-four years had been his faithful companion. There also survive him his son and two daughters. In his death these have been deprived of a faithful, devoted and loving husband and father, and our hearts go out to them in sincere sympathy.

There may be those who say Judge Vickers had his faults. As his friend who loved him I seek not here to blot out his shortcomings. He had his faults, but compared and measured by his true worth they were small ones. He was human. He made no claims save those of a man, and a man among his fellows he was. In his case, as in the case of all great, self-sacrificing men, the history of the future will blot out any minor faults which he may have possessed and record in lasting words the invaluable services which he rendered to mankind.

Our friend has passed from among us. The worries, anxieties and troubles which filled an active life have been lifted from his patient shoulders. His labors here have ceased, but the people, State and country whom he so faithfully served will continue to remain his debtors, for all are the beneficiaries of his splendid work. On a bleak winter afternoon, January 21, 1915, the final summons came, and he who had so gallantly met the adversities of youth, the opposition in manhood and the labors of a useful life, in honor surrendered to accept a peace to which he was justly entitled. We took him tenderly to the little city that he so much loved,—to the scenes of his young manhood in that community where he had builded his home, claimed his bride and where his children were born,—and there, in the beautiful cemetery on the hill top, overlooking the court house where he had fought his first legal battles, attended by members of this court and eminent jurists and lawyers, surrounded by the humble people who loved him and mourned his loss, we placed him in his tomb and upon his grave deposited a bower of flowers in token of our affection. There may he sleep in peace in his windowless palace of rest until that gentle springtime when He who spoke to Moses from the rock on Sinai's dizzy heights shall speak again to raise and to bless.

The committee, Bruce A. Campbell, Robert McMurdy and James M. Graham, appointed by the Illinois State Bar Association to prepare and present on its behalf a memorial to the Supreme Court upon the life and character of Judge Vickers, presented the following tribute to the man and jurist:

"It is always hard to break the ties which bind us to those with whom we have been associated, but our sorrow is augmented when death not only takes from us a friend and associate, but deprives the State of a public servant whose service has been great and who also gave us the promise and the hope of even greater and more valuable service in the future. Alonzo K. Vickers was such a man. Fifteen years as a trial judge and three years upon the Appellate bench gave him a splendid training for the work of this court. In addition he was equipped with a splendid legal mind, an ability and inclination for hard work, indomitable energy and a deep knowledge of the law, which, when combined with his knowledge of life and of the strength and of the weaknesses of the human race, rendered him peculiarly fit for the position which he held at the time of his death.

"Judge Vickers was not content to stand still, but desired, above all, each day to be a better judge than he was the day before, and it can truthfully be said that in this he accomplished his desire. He never felt, in cases submitted to this court, that he should be limited to the points and authorities suggested by counsel, but he studied his cases from every viewpoint and every angle, even, when necessary, conducting independent investigations of the legal questions involved. His mind was always open and his sole endeavor was to form a right conclusion. When his opinion was once formed he tenaciously held to it until convinced that it was wrong, but he had no pride of opinion, and was ready to admit his error when he found that he had committed one. He had great reasoning powers and nothing suited him better than to take a difficult case and apply to it his knowledge of the law, his sense of natural justice, his experience and his common sense and reason out the just result. He knew men, their common experiences, their joys and their sorrows and the motives that actuated them. From that knowledge, in many cases, he in-

tuitively knew where the right lay. He was a lawyer above all things, and did not believe in the overturning of precedent or in the disregarding of prior decisions of the court. He at all times had the courage of his convictions. His neighbors and friends always knew his position upon public questions, and he did not trim his sails to meet the storm of public opinion but always measured his course by the dictates of his own honest convictions. His opinions while a judge of this court reflected the man. They were always clear, vigorous and well prepared. The language used was of that kind that men knew and understood. When one read his opinions he was impressed with their finality and with the idea that the last word upon the subject had been written.

"Judge Vickers loved the law, both as a profession and as an institution. He believed that the settled law of the land was the result of the best efforts of the profession and of the bench to establish rules of natural justice and to lay down principles of judicial interpretation for the future. In his intercourse with his fellow-men,—judges, lawyers and laymen,—he was courteous and genial; a friendly man, who made friends and who loved to mingle with them. He thoroughly enjoyed the work of the Illinois State Bar Association and of the local bar associations. He rarely missed a meeting of the State association, and when time permitted he was always ready and willing to attend meetings of the bar, address the members upon timely subjects, mingle with them and exchange ideas for the betterment and improvement of all. He loved his work—in fact, lived with it. He properly appreciated the dignity of this court and of his position upon it, but he did not allow this to interfere with his relations to his friends, his neighbors and his fellow-lawyers. Summing it all up, he was a real man, a splendid citizen, a deep lawyer and a great judge. What more can be said of any member of our profession?

"The Illinois State Bar Association desires to express and record its appreciation of his qualities as a judge and as a man, to express its sincere regret at his untimely death, and its grief at the great loss to the State and to the profession by reason thereof, and to this end this memorial is presented to the great court which he loved, honored and respected and as a judge of which he rendered such inestimable and valuable service."

**Mr. CHIEF JUSTICE CARTWRIGHT:**

Again by the death of a judge of this court the sacred trust committed to him has been returned to the people to be delivered to another. They gave into his hands the constitution and exacted from him a solemn oath to support it, in order that it should remain as it had been,—a shield and a protection to liberty against the exercise of arbitrary power, either against an individual or by a majority against a minority, and that its guaranties should neither be weakened nor destroyed. They committed to his care the laws governing the rights and relations of individuals among themselves and between the citizen and the State, to be construed and administered for the maintenance of right and justice and the protection of life, liberty and property. His record is closed, and after the close of his service to the people and the State we turn aside at this hour from other duties to recall how well and with what ability, force and fidelity he performed his duties as a judge and fulfilled the obligations to the people which he assumed. Mr. Justice Cooke will respond on behalf of the court to the memorial presented and what has been said in connection with it.

**Mr. JUSTICE COOKE:**

On behalf of the members of the court I desire to say that we appreciate deeply the spirit which has prompted the offering of these resolutions and all that has been said concerning the life and work of our late associate. Immersed and absorbed as we all are in the intense activities of this age, we are prone to overlook and neglect opportunities to show an appreciation of the unselfish and important work which is being prosecuted in every community for the public welfare and to give due credit to the living who participate in such work. It is therefore fitting that both the bench and the bar should lay aside their usual cares and duties and pay this tribute of respect to the memory of one who has so signally distinguished our profession. In doing his memory this honor we honor ourselves.

To us, who were associated with Judge Vickers so intimately during his service as a member of this court, these proceedings have a peculiarly personal interest. You knew him as the farmer boy ambitious to fit himself to secure and maintain an honorable position in the community; as the school teacher; the editor of



a country newspaper; the lawyer; the judge, to whom you submitted your controversies for decision, and as a neighbor and friend, and you have spoken of him from your viewpoint. As his associates upon the bench we have known Judge Vickers in a different way and more intimately than is possible for many men to know one another. By reason of the nature of the work and our methods of performing it no man can serve nine years as a member of this court without revealing to his associates his true character. All his characteristics, whether they be good or bad, weak or strong, are here sooner or later laid bare. It is my privilege, on behalf of the court, to speak of Judge Vickers from the standpoint of this intimate relationship.

That Judge Vickers, in common with all other men, had faults goes without saying. I would do his memory an injustice to assert otherwise. His faults were not glaring ones, however, and were so overshadowed by his many good qualities and sterling worth as to be passed unnoticed or be easily and speedily forgotten. That he was a man of exceptional ability and extraordinary force of character must be evident from his whole career. By his work on this court, and particularly in the conference room, he has enabled his associates to truly appreciate him in this respect. While he was not always quick to grasp a proposition and his mental processes would sometimes appear to be slow, he was nevertheless possessed of a strong mind and was a sound and logical reasoner. In debate he was an antagonist to be reckoned with, as he drove home the points he desired to make with force and precision. This characteristic, displayed so effectively in the conference room, is reflected in his written opinions, which stand forth as splendid examples of strength, logic and virility. While he was open-minded and was always able and ready to consider and carefully weigh every argument presented on each side of any proposition, when he once arrived at a conclusion he maintained it stoutly and vigorously and was utterly indifferent to criticism of his position from any source. His sense of justice was keen, and the thought always uppermost in his mind was to accomplish natural justice, as nearly as was possible, in every case.

Judge Vickers was not only possessed of a keen sense of humor, which was often pleasantly displayed during the work in conference, but he had the happy faculty of being able to aptly

illustrate a point or to enliven a discussion without creating a digression, by relating some humorous incident which had come under his personal observation while a member of the bar or while serving as a judge of the circuit court. These diversions not only afforded pleasure to his associates, but they served to disclose the method and results of his observations and the accurate insight he had obtained of human nature.

While we have not known Judge Vickers as long as most of you, we are able to say that his whole life has been one of growth. During the years we have served with him he has grown constantly, both in strength and vigor as a member of the court and in appreciation of the importance of the position. In his death the State lost not only a most capable and efficient official, but one who gave promise of even greater achievements.

It is of interest to note that during his service upon this court Judge Vickers was the author of 514 written opinions, 19 dissents and one concurring opinion. These appear in forty-six volumes of the Reports, his first opinion being found in Vol. 222 and the last in Vol. 267. His death was untimely, but his work will remain as a perpetual monument to his ability and his unswerving devotion to duty.

#### Mr. CHIEF JUSTICE CARTWRIGHT:

The memorial presented by the bar of St. Clair county, a further memorial of the State Bar Association, with the remarks accompanying the memorial presented in court, and the remarks of Mr. Justice Cooke, will be spread of record in the records of this court and will be published by the Reporter of Decisions.

As a further mark of respect to our departed associate the court will now adjourn.



**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF ILLINOIS.**

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HOMER K. GALPIN *vs.* THE CITY OF CHICAGO *et al.* Appellees.—(ELIZABETH C. WAYMAN, Admx., Appellant.)

*Opinion filed June 24, 1915—Rehearing denied October 7, 1915.*

1. **CONSTITUTIONAL LAW**—*constitutional provision as to amending laws construed.* Section 13 of article 4 of the constitution, providing that no law shall be revived by reference to its title only, etc., was not intended to limit or control repeals by implication, and if an act is complete in itself and does not purport to amend a prior act it is not within the constitutional prohibition, although its effect may be to repeal certain provisions contained in prior acts and substitute new provisions in lieu thereof.

2. **SAME**—*when act is within constitutional prohibition as to amending laws.* Even though an act professes to be an independent one and does not purport to amend any prior act, yet if, in fact, it makes changes in an existing act by adding new provisions and mingling the new with the old on the same subject, so as to make of the old and the new a connected piece of legislation covering the same subject, the later act must be considered an amendment of the former and is within the constitutional prohibition.

3. **SAME**—*part of section 58 of Municipal Court act is unconstitutional.* That part of section 58 of the Municipal Court act, as amended in 1907, which provides for the payment to the city of Chicago of one-half of all moneys collected upon judgments of the municipal court in cases of violation of park ordinances and for the payment of the remaining one-half to the board of park com-

missioners in whose favor the judgments were rendered is not within the title of the act and is unconstitutional.

4. *SAME—act of 1907, which required State's attorneys to pay fees into county treasury, was unconstitutional.* The act of 1907, (Laws of 1907, p. 320,) since repealed, which purported, by its title, to amend the Fees and Salaries act by adding section 9a, requiring State's attorneys in counties of the third class to pay all fees collected into the county treasury, was unconstitutional, in that its effect was to amend section 8 of the Fees and Salaries act by taking away the beneficial interest given by such section to State's attorneys in all fees collected by them, and was therefore an amendment of an act by reference to its title, only. (*Lyons v. Police Pension Fund*, 255 Ill. 139, followed.)

5. *SAME—act of 1907, for payment of further compensation to State's attorney of Cook county, was unconstitutional.* The act of 1907, (Laws of 1907, p. 323,) since repealed, which was entitled "An act providing for the payment by the county of Cook of further compensation to the State's attorney of said county," was in violation of the provision of section 13 of article 4 of the constitution that no act shall embrace more than one subject and that shall be expressed in its title, since the effect of the act was not merely to provide further compensation to such State's attorney, but also to take away from him the right to fees and commissions to which he was entitled under section 8 of the Fees and Salaries act, without mention of such purpose in the title.

6. *FEES AND SALARIES—promise to perform duties of office for compensation other than that fixed by law is illegal.* Fees or salary of an officer which are fixed by law are incident to the office, and as it is contrary to public policy for a candidate to attempt to attain an office by a promise to perform the duties for any compensation other than that fixed by law, such a promise is illegal and will not be enforced, by way of estoppel, in a suit begun after the term of office has expired, to recover the legal compensation.

7. *SAME—what does not raise estoppel against collecting fees.* The mere fact that a public officer has, by treating an act of the legislature as valid, received less compensation for his services than he would be entitled to if the law were invalid, does not raise an estoppel against his right to attack the validity of the act after his term of office has expired and recover the fees to which he is entitled if the act be invalid.

8. *STATE'S ATTORNEYS—section 8 of Fees and Salaries act does not entitle State's attorney to fees not taxed as costs.* Section 8 of the Fees and Salaries act, as amended in 1907 and 1909, does not entitle the State's attorney of Cook county to any of the fees allowed by such section until the same have been taxed as costs,

and it is only when such fees have been taxed as costs and the same cannot be collected from the persons against whom they are taxed that he has the right to apply fines and forfeitures collected by him to the payment of such fees.

9. SAME—*when the fines and penalties paid to clerk are "collected" by State's attorney.* Fines and penalties paid to a clerk of court are "collected" by the State's attorney, within the meaning of section 8 of the Fees and Salaries act, when the prosecution of the case which resulted in the imposition of the fine or penalty was conducted by the State's attorney and when the law makes it the duty of the State's attorney to collect fines and penalties imposed in suits not prosecuted by him; and where there is no evidence to the contrary it must be presumed that the State's attorney prosecuted all suits which it was his duty, under the statute, to prosecute.

10. SAME—*what suits for penalties should be prosecuted by the State's attorney.* Prosecutions for violations of the provisions of the Pharmacy act, the Dentistry act and the Employment Offices and Agencies act are prosecutions in which the people of the State are concerned and come within the duties prescribed by law for State's attorneys, and the fines and penalties imposed for violations of such acts are therefore to be regarded as "collected" by the State's attorney in determining the question of commissions.

11. SAME—*effect of act of 1911 as to fines and penalties for violations of park ordinances.* By the act of 1911, providing for a park police pension fund, (Laws of 1911, p. 445,) the right of the superintendent of schools to moneys collected as fines and penalties for violations of park ordinances was taken away, and with it the duty of the State's attorney to prosecute suits for such violations, and his right to commissions on the fines and penalties imposed therefor, which had theretofore existed, ceased and determined, and he has no right to have fines and penalties imposed since that act took effect, applied upon uncollected fees.

12. SAME—*section 8 of Fees and Salaries act was not repealed by implication.* The provision of section 8 of the Fees and Salaries act, as amended in 1883, that the ten per cent commission of State's attorneys "shall be paid out of any fines or forfeited recognizances collected by them," and that they shall have a lien for their fees "on judgments for fines and forfeitures procured by them," has been, in substance, embodied in all subsequent amendments of section 8 and must be regarded as having been continuously in force since 1883, and said section has not been repealed, by implication, by the various acts providing for the disposition of fines and penalties.

13. INTEREST—*disposition of interest received by clerk of court upon fines and penalties.* Upon a bill of interpleader by a clerk of a court to determine the rights of various claimants to a fund in his hands derived from fines and penalties, interest which he has received upon such fund should be divided into parts, proportionately, the same as the principal, and distributed accordingly among the claimants found entitled to the principal.

APPEAL from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding.

THOMAS MARSHALL, for appellant.

JOHN W. BECKWITH, Corporation Counsel, (JOSEPH F. GROSSMAN, of counsel,) for appellee the City of Chicago; ROBERT REDFIELD, for the South Park Commissioners; FRANCIS O'SHAUGHNESSY, for the Lincoln Park Commissioners; JACOB C. LeBOSKY, for the West Chicago Park Commissioners; P. J. LUCEY, Attorney General, and THOMAS J. O'HARE, for the Boards of Pharmacy, Dental Examiners and the Commissioners of Labor; CARL R. CHINDBLOM, and JOHN P. BARNES, for Cook county; WILLIAM F. STRUCKMANN, and WALTER E. MOSS, for the County Superintendent of Schools; HOWARD W. HAYES, for the trustees of the several pension funds; HENRY P. CHANDLER, and M. H. GLADSTONE, for certain appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

On December 13, 1912, Homer K. Galpin filed in the circuit court of Cook county his bill of interpleader, alleging that in November, 1906, he was elected clerk of the municipal court of Chicago and held that office until December 2, 1912; that during the four-year period beginning December 6, 1908, and ending December 1, 1912, the fines and penalties paid to him by persons convicted of violating various statutes and park ordinances particularly mentioned in the bill, aggregated the sum of \$191,206.50,

and that he has received interest amounting to \$5998.10 on said fund and \$5272.30 as interest on funds other than those above mentioned; that John E. W. Wayman, who was State's attorney of Cook county during the said four-year period, the county of Cook and the superintendent of schools of Cook county are each claiming the entire fund, and the city of Chicago, the South Park Commissioners, the Commissioners of Lincoln Park, the West Chicago Park Commissioners, the North Shore Park District, the Ridge Avenue Park District, the State Board of Pharmacy, the Illinois State Board of Dental Examiners, the State Board of Commissioners of Labor, E. A. Rust, Charles Hagenbucher, Christ Heiser, Joseph Obornij and Matt A. Berkholz are each claiming specific portions of said fund; that complainant has always been, and is now, willing to pay the amounts collected by him as such clerk, and interest accrued thereon, to the person or persons lawfully entitled to the same, but is, by reason of the various conflicting claims aforesaid, uncertain as to the proper distribution of the fund. All of said claimants were made defendants to the bill, which prayed that they be required to interplead and settle and adjust their demands among themselves.

All of the defendants except Rust, Hagenbucher, Heiser, Obornij and Berkholz, who were deputy game wardens and whose interests, if any, in the fund are insignificant, answered the bill, setting up their various claims to the fund or to portions thereof. The boards of trustees of various police pension funds filed an intervening petition, praying that they be made defendants and be permitted to set up, by way of answer, their claims to portions of the fund. The prayer of the petition was granted, and answers were filed by the respective boards of trustees of the police pension funds. Hale Gossart also filed an intervening petition praying to be made a party defendant and claiming \$75 of the fund.



On September 15, 1913, the death of John E. W. Wayman was suggested, and Elizabeth C. Wayman, as administratrix of his estate, was substituted as a defendant in his stead. Thereafter the court entered an order allowing the complainant to retain out of the fund in his hands \$1049.85 on account of costs and expenses incurred by him in filing the bill of interpleader, and directing him to pay the balance, amounting to \$201,427.05, to the clerk of the circuit court, which was accordingly done and the complainant was dismissed from the suit.

The cause was heard by the chancellor upon a stipulation of facts, and a decree was entered finding that the defendant Hale Gossart is entitled to \$75 of said fund, that the city of Chicago is entitled to \$5272.32 of said fund and that the county of Cook is entitled to the balance of said fund, and directing the clerk to distribute the fund among said parties in the proportions in which they are entitled to the same as found by the decree. From that decree Elizabeth C. Wayman, as administratrix, has prosecuted this appeal, and various of the defendants who were found to have no interest in the fund, and the city of Chicago, have assigned cross-errors.

No complaint is made by any of the parties of that portion of the decree which awards to Gossart \$75 and to the city of Chicago \$5272.32 of the fund. The controversy here is over the proper distribution of the remainder of the fund, amounting to \$196,079.73.

The Wayman estate claims the entire fund under and by virtue of section 8 of the Fees and Salaries act and section 239 of the School law. That portion of said section 8, as amended in 1907, necessary to be here noticed is as follows: "State's attorneys shall also be entitled to the following fees: \* \* \* All the foregoing fees shall be taxed as costs to be collected from the defendant, if possible, upon conviction. But in cases of inquiry into the sanity or insanity of any person alleged to be insane, in

cases on a charge of bastardy and in case of appeal or writ of error in the Supreme or Appellate Court, where judgment is in favor of the accused, the fees allowed the State's attorney therein shall be retained out of the fines and forfeitures collected by them in other cases. Ten per cent of all moneys, except revenue, collected by them and paid over to the authorities entitled thereto, which per cent, together with the fees provided for herein that are not collected from the parties tried or examined, shall be paid out of any fines and forfeited recognizances collected by them. State's attorneys shall have a lien for their fees on moneys except revenue received by them until such fees and earnings are fully paid." (Laws of 1907, p. 329.)

Section 239 of the School law of 1909 reads as follows: "It shall be the duty of the State's attorneys of the several counties to enforce the collection of all fines, forfeitures and penalties imposed or incurred in the courts of record of their respective counties, and to pay the same to the county superintendent of the county wherein the same have been imposed or incurred, retaining therefrom the fees and commissions allowed them by law." (Laws of 1909, p. 406.) This provision of the School law of 1909 is identical with section 2 of article 14 of the School law of 1889, which was in force when Wayman became State's attorney of Cook county.

The county of Cook claims the entire fund under and by virtue of two acts of the General Assembly approved May 17, 1907, both of which have since been repealed. One of these acts is referred to in this proceeding as House Bill 231 and the other as House Bill 232. House Bill 231 was as follows:

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That 'An act concerning fees and salaries, and to classify the several counties of this State with reference thereto,' approved March 29, 1872, in force July 1, 1872, title as amended by

act approved March 28, 1874, in force July 1, 1874, 'Act as amended by an act approved May 15, 1903, in force July 1, 1903,' be and the same is hereby amended by adding thereto section 9a to read as follows:

"9a. Each State's attorney in counties of the third class, hereafter to be elected, at the end of each and every quarter of the year after entering upon the duties of his office and within ten days after the expiration of his term of office shall pay all fees collected and remaining in his hands into the county treasury of his county." (Laws of 1907, p. 320.)

House Bill 232 read as follows:

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the State's attorney of Cook county shall be paid by the said county, in addition to the salary which may be paid to him from the State treasury, such further compensation as will make his salary amount to the sum of \$10,000 per annum, which sum shall be in full payment for all services rendered by him.

"Sec. 2. The said compensation shall be paid in equal quarterly installments; and it shall be the duty of the county comptroller of said county, at the end of each and every quarter of the year, to draw an order or warrant therefor in favor of the State's attorney on the county treasurer of said county, whose duty it shall be to pay the same on its presentation properly endorsed: *Provided*, that no warrant shall be drawn or money paid unless the State's attorney shall have, for the current quarter, made a report to the commissioners of said county and paid into the county treasury all fees collected by him as State's attorney for said quarter." (Laws of 1907, p. 323.)

The Wayman estate contends that both of these acts were unconstitutional for various reasons, but it will be necessary to consider but one of the grounds urged against each act.

It is contended by the Wayman estate that House Bill 231 violated that portion of section 13 of article 4 of the constitution which provides that "no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act." This provision of the constitution has been considered in numerous cases decided by this court since the adoption of our present constitution. The question arising in most of the cases has been whether an act which does not in express terms purport to amend another act, but which in fact does alter or change some prior act, is within the constitutional inhibition. Soon after the adoption of the constitution of 1870 this question was presented in *People v. Wright*, 70 Ill. 388. It was pointed out in that case that the act there under consideration did not purport to amend any particular section of any act, and that all that could be said of it in that respect was, that by implication it amended the municipal charters of cities. With reference to the constitutional provision above quoted it was said: "It cannot be held that this clause of the constitution embraces every enactment which in any degree, however remotely it may be, affects the prior law on a given subject, for to so hold would be to bring about an evil far greater than the one sought to be obviated by this clause." In many subsequent cases it has been held that it was not the purpose of the framers of the constitution to limit or control repeals by implication, but that if an act is complete in itself and does not purport to amend a prior act it is not within the constitutional prohibition, although its effect may be to repeal certain provisions contained in prior acts and to substitute new provisions in lieu thereof. (*Geisen v. Heiderich*, 104 Ill. 537; *School Directors v. School Directors*, 135 id. 464; *People v. Knopf*, 183 id. 410; *People v. Loeffler*, 175 id. 585; *Erford v. City of Peoria*, 229 id. 546; *People v. McBride*, 234 id. 146; *People v. Jones*, 242 id. 138; *Hollingsworth v. Coal*

Co. 243 id. 98; *People v. VanBever*, 248 id. 136; *People v. Crossley*, 261 id. 78.) On the other hand, even though an act professes to be an independent act and does not purport to amend any prior act, still if, in fact, it makes changes in an existing act by adding new provisions and mingling the new with the old on the same subject so as to make of the old and the new a connected piece of legislation covering the same subject, the later act must be considered an amendment of the former and as within the constitutional prohibition. (*Badenoch v. City of Chicago*, 222 Ill. 71; *Brooks v. Hatch*, 261 id. 179.) The case at bar, however, is not governed by the rules laid down in either of the two lines of cases above mentioned, for the reason that House Bill 231 did not purport to be an independent act or to be complete in itself, but both in the title and in the body of the act it was stated that the purpose of the act was to "amend" the Fees and Salaries act "by adding thereto section 9a." An examination of the provisions of House Bill 231 in connection with the other provisions of the Fees and Salaries act discloses the fact that the only purpose of the new act was to amend section 8 of the prior act by changing the beneficiary of the fees authorized by said section 8 to be taxed as costs in favor of State's attorneys in counties of the third class. Under the Fees and Salaries act as it existed at the time of the adoption of House Bill 231, State's attorneys in all of the counties of the State were the beneficiaries of all the fees enumerated in said section 8. The effect of House Bill 231, if valid, was to take away from State's attorneys in counties of the third class the right to the beneficial enjoyment of such fees and to make the county the beneficiary thereof. House Bill 231 therefore amended a prior law by reference to its title, only, and the section amended was not inserted at length in the new act. This was a clear violation of section 13 of article 4 of the constitu-

tion, (*People v. Election Comrs.* 221 Ill. 9,) and rendered said House Bill 231 inoperative and void.

The situation here is, in principle, the same as that disclosed in *Lyons v. Police Pension Fund*, 255 Ill. 139. The title of the act there held to violate the provision of the constitution above quoted was, "An act to amend an act entitled 'An act to provide for the setting apart, formation and disbursement of a police pension fund in cities, villages and incorporated towns.'" The nature of the amendment was the addition to the former act of a new section, to be known as section 3a, extending the benefit of the act to police matrons in the police department of a city upon the terms specified in such additional section. In holding that the amendatory act violated the provision of section 13 of article 4 of the constitution above quoted we said: "The title gives no intimation of the character of the amendment or the section or part of the act to be amended. The amendatory act was, in fact, an amendment of section 3 of the original act, where, only, it is declared who may become entitled to pensions. \* \* \* The amendatory act changes that section by adding to the persons who may receive pensions, police matrons appointed and sworn, of twenty years' service, and it also contains many provisions applying to pensions to police matrons which do not appear in original section 3 and which might have appeared as amendments to other sections or as additional sections. Section 3 as amended is not inserted at length in the new act. In order to ascertain the extent of the provisions of that section to-day, it is necessary to examine not only the amendatory act, but to go back to the former statute and by reading the two together ascertain what persons may become pensioners. This is the condition which section 13 of article 4 of the constitution was intended to prevent by the provision that 'no law shall be revived or amended by reference to its title, only, but the law revived, or the section amended, shall be inserted at

length in the new act.' Calling the amendment an additional section does not change its character and cannot evade the constitutional requirement."

In this case, as in the *Lyons case*, the purpose of the act was expressly stated to be to amend a prior act by adding thereto a new section. The new section added by amendment in the *Lyons case* increased the beneficiaries who might participate in the fund provided for in the original act, by adding thereto a new class of beneficiaries. The new section added by amendment in this case took away from one class of beneficiaries the right to the fees and commissions allowed them by section 8 of the Fees and Salaries act and substituted another class of beneficiaries therefor. In this case, as in the *Lyons case*, the title gave no intimation of the character of the amendment or the section or part of the act to be amended. The amendatory act was, in fact, an amendment of section 8 of the original act, and changed that section by substituting for the beneficiaries specified in said section 8 other beneficiaries designated in the amendatory act. Section 8, as amended, was not inserted at length in the new act, and in order to ascertain the extent of the provisions of that section as it existed after the adoption of House Bill 231, it was necessary to examine not only the amendatory act but to go back to the former statute, and by reading the two together ascertain the disposition made by law of the fees provided for in said section 8 and the rights of the county with reference to those fees. This case, therefore, as well as the *Lyons case*, presents a condition which section 13 of article 4 of the constitution was intended to prevent by the provision that "no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act."

Section 13 of article 4 of the constitution also provides: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." With ref-

erence to this provision we said in *Rouse v. Thompson*, 228 Ill. 522: "The title of an act formerly was of little importance. Of recent years, however, by reason of the adoption by most of the States of constitutional provisions similar to the one above quoted, the title to an act in such States is now of very great importance. Some of the reasons which led to the adoption of such constitutional provisions are said to be, first, to prevent 'log-rolling' legislation; second, to prevent surprise or fraud upon the legislature by inserting provisions into bills of which the titles give no intimation and which might by oversight be carelessly and unintentionally adopted; and third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation being considered, so they might be heard thereon, if they so desire, by petition or remonstrance. And while such constitutional provisions are to be liberally construed in order that a legislative enactment may be sustained, the court cannot permit such provisions to be disregarded or overridden in the enactment of legislation."

The title of said House Bill 232 was, "An act providing for the payment by the county of Cook of further compensation to the State's attorney of said county." This was a companion bill of House Bill 231 and was evidently passed by the legislature on the supposition that House Bill 231 was a valid enactment. Had House Bill 231 been valid, then the objection made by the Wayman estate that the subject of House Bill 232 was not expressed in the title of the act could not be sustained, because had House Bill 231 taken away the right of the State's attorney to the fees specified in section 8 of the Fees and Salaries act, the effect of House Bill 232 would have been merely to provide additional compensation for the State's attorney of Cook county. If, however, House Bill 232 be considered alone and without regard to House Bill 231,—and it must now be so considered,—then it must be held that



it violated that provision of the constitution last above quoted, because, when so considered, its effect, if enforced, would have been not merely to provide for the payment of further compensation to the State's attorney of Cook county, but also to take away from him the right to the fees and commissions allowed him by section 8 of the Fees and Salaries act. The title of the act, professing to be the title to an act providing for the payment of further compensation to the State's attorney, gave no intimation of the provisions of the act depriving the State's attorney of the right to the beneficial enjoyment of the fees and commissions allowed him by section 8 of the Fees and Salaries act. "Further compensation" means compensation in addition to that already provided for, and it requires no argument to show that provisions in the act which, instead of providing for the payment of further compensation to the State's attorney, attempted to take away from him the compensation then provided for by law, were not within the title of the act and were therefore inoperative and void. It is therefore clear that House Bill 232 must fall with House Bill 231, because if House Bill 232 be considered as the legislation depriving the State's attorney of Cook county of the fees allowed him by section 8 of the Fees and Salaries act and requiring the payment into the county treasury of all fees collected by him, the subject of the act was not expressed in the title.

For the reason that the two acts under which the county of Cook claims the fund in controversy were void, it necessarily follows that the county has no valid claim to the fund or to any part thereof, and the decree of the circuit court in so far as it awards a portion of the fund to the county is erroneous. Each of these acts has been repealed by a later act which has been held valid in *Hoyne v. Danisch*, 264 Ill. 467, *Butzow v. Kern*, id. 498, and *Hoyne v. Ling*, id. 506. The matters determined in those cases have no bearing upon the questions here involved and the

decision in this case does not affect the questions there decided.

From the stipulation upon which the cause was heard in the circuit court it appears that Wayman stated publicly during his campaign for election in October, 1908, that if elected State's attorney he would accept an annual salary of \$10,000 and pay into the county treasury all fees. It further appears that Wayman received from the county treasurer of Cook county, upon warrants drawn by the county comptroller, each of which warrants recited that it was for Wayman's salary as State's attorney, the sum of \$800 per month during his entire term of office, and that during such period he paid to the county treasurer a total of \$62,970.75, which sum he reported to the board of commissioners of Cook county represented the fees received by him as State's attorney during his term of office. It is contended by the various parties whose claims conflict with that of the Wayman estate, that by reason of this conduct on Wayman's part his estate is now estopped from claiming any portion of the fund in controversy. With this contention we cannot agree. The fees or salary of an officer having been fixed by law become an incident to the office, and it is contrary to public policy for candidates to attempt to attain such office by promises made to the electors to perform the duties of the office for any other or different compensation than that fixed by law. Such promises being illegal, they cannot be enforced. (*Abbott v. Hayes County*, 78 Neb. 729; *People v. Board of Police*, 75 N. Y. 38.) Whether, as held by some courts of last resort, such conduct on the part of a successful candidate is sufficient to invalidate his election it is not necessary or proper here to determine, as that question could only be properly presented in a proceeding brought against the officer to test his right to office. It cannot be raised where, as here, the officer's term has expired and the controversy concerns only his right to the fees of his office.

Neither was Wayman estopped from claiming the compensation fixed by statute for his services as State's attorney. In *Holcomb v. Boynton*, 151 Ill. 294, we said: "It is a novel idea in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all. As we understand the doctrine of estoppel *in pais*, it is based upon a fraudulent purpose and a fraudulent result. Before it can be invoked to the aid of a litigant it must appear that the person against whom it is invoked has by his words or conduct caused him to believe in the existence of a certain state of things and induced him to act upon that belief. If both parties are equally cognizant of the facts and one has acted under a mistaken idea of the law, the other party cannot say he has been deceived thereby and is entitled to an application of the rule, but will be considered as having acted upon his own judgment, solely." To the same effect is *Finch v. Theiss*, 267 Ill. 65.

In order to clearly understand the nature of the claims to the fund made by the various claimants other than the county of Cook it will be necessary to mention the sources from which this fund came into the hands of the clerk of the municipal court.

From the stipulation upon which the cause was heard by the chancellor it appears that the fund in controversy represents the fines and penalties received by the clerk of the municipal court during the four-year period beginning December 6, 1908, and ending December 1, 1912, and interest thereon; that the receipts from fines in criminal and *quasi* criminal cases amounted to \$109,369; that the receipts from penalties imposed for violations of the provisions of an act entitled "An act to promote attendance of children in schools and to prevent truancy," approved June 11, 1897, in force July 1, 1897, and sections 274 and

275 of an act entitled "An act to establish and maintain a system of free schools," approved and in force June 12, 1909, amounted to \$1222.50; that the receipts from penalties imposed for violations, within the jurisdiction of the city of Chicago, of an act entitled "An act defining motor vehicles," etc., approved May 28, 1907, in force July 1, 1907, and an act of like title approved July 10, 1911, in force July 1, 1911, amounted to \$230.50; that the receipts from penalties imposed in proceedings instituted by the South Park Commissioners for violations of South Park ordinances amounted to \$40,866.50, of which \$17,508 was collected prior to July 1, 1911, and \$23,358.50 on or after that date; that the receipts from penalties imposed for violations, within the jurisdiction of the South Park Commissioners, of the Motor Vehicle acts of May 28, 1907, and June 10, 1911, amounted to \$8889; that the receipts from penalties imposed in proceedings instituted by the Commissioners of Lincoln Park for violations of Lincoln Park ordinances amounted to \$1324, of which \$405 was collected prior to July 1, 1911, and \$919 on or after that date; that the receipts from penalties imposed for violations, within the jurisdiction of the Commissioners of Lincoln Park, of the Motor Vehicle acts of May 28, 1907, and June 10, 1911, amounted to \$7949; that the receipts from penalties imposed in proceedings instituted by the West Chicago Park Commissioners for violations of West Chicago Park ordinances amounted to \$9046.50, of which \$4954 was collected prior to July 1, 1911, and \$4092.50 on or after that date; that the receipts from penalties imposed for violations, within the jurisdiction of the West Chicago Park Commissioners, of the Motor Vehicle acts of May 28, 1907, and June 10, 1911, amounted to \$11,115; that the receipts from penalties imposed in proceedings instituted by the commissioners of North Shore Park District for violations of North Shore Park ordinances amounted to \$33; that the

receipts from penalties imposed for violations, within the jurisdiction of the commissioners of North Shore Park District, of the Motor Vehicle acts of May 28, 1907, and June 10, 1911, amounted to \$20; that the receipts from penalties imposed in proceedings instituted by the commissioners of Ridge Avenue Park District for violations of Ridge Avenue Park ordinances amounted to \$5; that the receipts from penalties imposed for violations of the provisions of an act entitled "An act to regulate the practice of pharmacy in the State of Illinois," etc., approved May 11, 1901, in force July 1, 1901, amounted to \$145; that the receipts from penalties imposed for violations of the provisions of an act entitled "An act to regulate the practice of dental surgery and dentistry in the State of Illinois," etc., approved June 11, 1909, in force July 1, 1909, amounted to \$335; that the receipts from penalties for violations of the provisions of an act entitled "An act relating to employment offices and agencies," approved and in force May 11, 1903, amounted to \$599; and that the receipts from penalties imposed for violations of the provisions of an act entitled "An act for the protection of game, wild fowl and birds," etc., approved April 23, 1903, in force July 1, 1903, in actions in which complaints were filed by E. A. Rust, Charles Hagenbucher, Christ Heiser, Joseph Obornij and Matt A. Berkholz, deputy game wardens, amounted to \$57.50. The interest which accrued in the hands of the clerk of the municipal court upon the respective sums above mentioned aggregated \$5998.10. The clerk also received \$5272.30 interest on funds in his hands other than the funds above mentioned. The item of interest last mentioned was awarded to the city of Chicago, and no complaint is made of the action of the chancellor in that regard.

The Wayman estate claims that the uncollected fees to which Wayman, during his term of office, was entitled by virtue of section 8 of the Fees and Salaries act amounted

to \$416,729.90; that no part of the same has been paid, and that by virtue of said section 8, considered in connection with section 239 of the School law, the Wayman estate is entitled to all the moneys received by the clerk of the municipal court from fines and penalties, and the interest accrued thereon, to apply on these uncollected fees. The other claimants contend that the uncollected fees to which Wayman was entitled by virtue of said sections 8 and 239 do not amount to as much as the fund in controversy, so that in any event the Wayman estate would not be entitled to the entire fund. This controversy over the amount of uncollected fees arises from the following state of facts:

Section 8 of the Fees and Salaries act, as amended in 1907 and as in force when Wayman became State's attorney of Cook county, after providing a fee of \$30 for each conviction for offenses punishable by death or imprisonment in the penitentiary, allowed a fee of \$15 for each conviction in other cases in courts of record. (Laws of 1907, p. 239.) In 1909 the legislature amended said section 8 of the Fees and Salaries act by providing, with reference to the class of cases in which a fee of \$15 was allowed, that "no such fees shall be allowed in any such case tried in the municipal court of Chicago, unless the same be tried by jury or unless the trial thereof shall occupy more than one full day, and then only in case the court shall expressly order such fees to be allowed." (Laws of 1909, p. 231.) After this act became effective 16,955 convictions were had in criminal cases in the municipal court of Chicago for violations of provisions of the Criminal Code wherein no State's attorney's fees were taxed as costs and wherein no order was entered that any such fees be allowed. The claim for uncollected fees by the Wayman estate includes \$254,325 on account of the 16,955 convictions in the municipal court in which no State's attorney's fees were taxed as costs against the defendants. It also

includes \$19,120.65 as a commission of ten per cent on the principal sum of \$191,206.50 received by the clerk of the municipal court from fines and penalties imposed by the municipal court of Chicago during Wayman's term of office.

It is not necessary to determine whether the provision added by the amendment of 1909 that no State's attorney's fees should be allowed in certain cases tried in the municipal court of Chicago violated some provision of the constitution, or whether, because enacted during Wayman's term of office, it could be enforced against him or against his estate, for the reason that as no such fees were taxed as costs against the defendants in such cases they were not included within the provision of said section 8 authorizing the payment of fees that are not collected from the parties tried or examined out of any fines and forfeitures collected by the State's attorney. This conclusion necessarily follows from a consideration of the various provisions of said section 8 as amended in 1907 and as again amended in 1909. During all of Wayman's term it was provided by said section 8 that "all the foregoing fees shall be taxed as costs to be collected from the defendant, if possible, upon conviction," and that "the fees provided for herein that are not collected from the parties tried or examined" shall be paid out of any fines or forfeitures collected by them. The intention of the legislature, as thus clearly expressed, was to provide certain fees as compensation for the State's attorney which should be taxed as costs and should be collected from the persons convicted, if possible, but if in any case it should not be possible to collect the fee from the person convicted, then the same should be paid out of any fines and forfeitures collected by the State's attorney. The State's attorney did not become entitled to any of the fees allowed by said section 8 until the same had been taxed as costs, and it was only when such fees had been taxed as costs and the same

could not be collected from the persons against whom they were taxed that the State's attorney had the right to apply fines and forfeitures collected by him to the payment of such fees. In *Galpin v. City of Chicago*, 249 Ill. 554, in considering what is included within the term "uncollected costs," as used in the Municipal Court act, where the clerk is authorized to apply moneys received from fines and penalties to the payment of the uncollected costs in criminal and *quasi* criminal cases, we said: "The phrase 'uncollected costs,' as used here, was intended to include only costs collectible by means of legal process,—that is, costs for which judgment had been rendered but which the proper officer had been unable to collect. Where the law does not provide for a judgment for costs and no judgment therefor is rendered, we are of the opinion that the statute was not intended to authorize the taking of any amount from the fund involved herein, thereby diminishing it to the detriment of the several governmental agencies or governmental purposes to which it might otherwise be applied." If the provision inserted in said section 8 by the amendment of 1909, taking away from the State's attorney his right to fees in certain cases tried in the municipal court, was invalid as applied to Wayman, it was his duty to have his fee in each case taxed as costs against the defendant, in order that the same might be collected, if possible, from the person convicted. Having failed to pursue that course his estate is not entitled to have any portion of the fund derived from fines and penalties applied to the payment of such fees.

Said section 8, as amended in 1907 and as again amended in 1909, provided that the State's attorney should be entitled to ten per cent of all moneys, except revenue, collected by him and paid over to the authorities entitled thereto, and that the same should be paid out of any fines and forfeitures collected by him. As hereinbefore stated, the Wayman estate claims that these commissions amount



to \$19,120.65, being ten per cent of all fines and penalties received by the clerk of the municipal court from all sources. Whether this contention is to be sustained depends upon whether all of these fines and penalties were "collected" by Wayman, within the meaning of the statutes allowing such commission. In our judgment fines and penalties paid to the clerk of a court were "collected" by the State's attorney, within the meaning of section 8 of the Fees and Salaries act, (1) when the prosecution of the case which resulted in the imposition of the fine or penalty was conducted by the State's attorney; and (2) when the law made it the duty of the State's attorney to collect fines and penalties imposed in suits not prosecuted by him. This was assumed, without discussion, in *Galpin v. City of Chicago, supra*. It must be presumed, there being no evidence to the contrary, that Wayman prosecuted all suits which, under the statute, it was his duty to prosecute. In order to determine upon what fines and penalties a commission of ten per cent for collection was allowed the State's attorney by said section 8, it is therefore necessary to determine what cases, under the statute, it was Wayman's duty to prosecute and what fines and penalties imposed in suits not prosecuted by him it was his duty, under the statute, to collect. It is conceded by the appellees that it was Wayman's duty, as State's attorney, to prosecute all suits from which the fines and forfeitures in question were derived except those brought to recover penalties for the violation of the Pharmacy act, the Dentistry act and the Employment Offices and Agencies act, and those brought to recover penalties for the violation of park ordinances.

Among the duties of State's attorneys, as prescribed by section 5 of the act entitled "An act in regard to attorneys general and State's attorneys," approved March 26, 1874, in force July 1, 1874, are: "First—To commence and prosecute all actions, suits, indictments and

prosecutions, civil and criminal, in any court of record in his county, in which the people of the State or county may be concerned. Second—To prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the State or his county, or to any school district or road district in his county. \* \* \* Tenth—To perform such other and further duties as may, from time to time, be enjoined on him by law.” (Rev. Stat. 1874, p. 173.)

Section 16 of the Dentistry act of 1909 provides that “any person who shall practice dentistry in this State without being registered or without a license for that purpose, or violates any of the provisions of this act, shall be subject to prosecution before any court of competent jurisdiction upon complaint, information or indictment, and shall, upon conviction, be fined for each offense in any sum not less than fifty dollars (\$50) nor more than two hundred dollars (\$200). All fines imposed and collected under this act shall be paid to the Illinois State Board of Dental Examiners for its use.” This is identical with the provision contained in the Dentistry act of 1905.

Section 7 of the Employment Offices and Agencies act provides that “any superintendent, assistant superintendent or clerk, who shall accept, directly or indirectly, any fee or compensation from any applicant or from his or her representative, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five nor more than fifty dollars and imprisoned in the county jail not more than thirty days.” Section 10 of the same act provides: “It shall be the duty of the commissioners of labor, and the secretary thereof, to enforce this act. When informed of any violation, it shall be their duty to institute criminal proceedings for the enforcement of its penalties before any court of competent jurisdiction. Any person convicted of a violation of the

provisions of this act shall be guilty of a misdemeanor and shall be fined not less than fifty dollars (50) nor more than one hundred (100) dollars for each offense, or by imprisonment in the county jail for a period not exceeding six (6) months, or both, at the discretion of the court."

Prosecutions against persons violating the provisions of either of these acts are criminal suits or prosecutions in which the People of the State are concerned, and therefore come within the duties of State's attorneys as prescribed by the first subdivision of the said section 5; and section 15 of the Pharmacy act expressly provides that "it shall be the duty of the State's attorney of the county where such offense is committed to prosecute all persons violating the provisions of this act upon proper complaint being made." That portion of the fund derived from fines and penalties imposed for violations of these acts were therefore "collected" by the State's attorney, and he was entitled to a commission of ten per cent thereon.

It is not made the duty of the State's attorney to prosecute suits for the violation of park ordinances, but it does not necessarily follow that Wayman was not entitled to a commission of ten per cent upon the fines and penalties received by the clerk of the municipal court from such sources. As early as 1865 the School law of this State provided that all fines, penalties and forfeitures imposed or incurred in any of the courts of record or before any justice of the peace, except fines, forfeitures and penalties incurred or imposed in incorporated towns or cities for the violation of the by-laws or ordinances thereof, should, when collected, be paid to the school superintendent of the county wherein such fines, forfeitures and penalties have been imposed or incurred, for distribution in the same manner as the common school funds of the State are disbursed, and that it should be the duty of the State's attorneys to enforce the collection of all fines, forfeitures and penalties imposed or incurred in courts of record and

pay the same over to the school superintendents of the counties wherein the same have been imposed or incurred, retaining therefrom the fees and commissions allowed them by law. These provisions have been included in each revision of the School law since 1865 and were in force during Wayman's term of office.

It appears from the evidence herein that the South Park Commissioners, the Commissioners of Lincoln Park and the West Chicago Park District were created by private acts passed by the legislature in 1869, and although they were, respectively, empowered to pass ordinances for the regulation and government of the districts over which they were given jurisdiction and control, no provision was made for the collection of fines and penalties imposed for the violation of such ordinances nor for the disposition of moneys arising from such fines and penalties. It therefore followed as a necessary consequence, under the provisions of the School law, that it was the duty of the State's attorney to collect all such fines and penalties imposed in courts of record for the violation of park ordinances, and to pay the same over to the superintendent of schools after retaining therefrom the fees and commissions allowed him by law. No attempt was made by the legislature to otherwise dispose of such fines and forfeitures until the amendment, in 1907, of section 58 of the Municipal Court act of 1905. By the said amended section 58 it was provided with reference to fines and penalties imposed in the municipal court of Chicago in *quasi* criminal cases instituted in the name of any board of park commissioners situated, in whole or in part, within the city of Chicago, that the same should be paid to the clerk of the court and that the clerk should pay over the same as follows: "One-half of all fines and penalties to the city of Chicago, and one-half of the fines and penalties to the \* \* \* board of public park commissioners \* \* \* in whose favor such judgment shall have been entered." It is contended that this

section of the Municipal Court act, in so far as it attempted to dispose of the fines and penalties imposed in the municipal court of Chicago, violated that portion of section 13 of article 4 of the constitution which provides that no act hereafter passed shall embrace more than one subject and that shall be expressed in the title. The title of the Municipal Court act is, "An act in relation to a municipal court in the city of Chicago." In *Riggs v. Jennings*, 248 Ill. 584, we said: "The subject of legislation is a municipal court in the city of Chicago. \* \* \* The title of this act covers everything in relation to the creation, organization, jurisdiction and procedure of the municipal court, and it is not necessary that it should mention the details of the legislation dealing with the various subdivisions of the subject."

Legislation concerning the disposition of fines and penalties imposed by the municipal court do not relate to the creation, organization, jurisdiction or procedure of the court, and cannot, therefore, be said to relate to a municipal court unless such disposition is incidental to legislation providing for the maintenance of such court. Provisions for the support of park systems or for general city purposes have no relation to the maintenance of a municipal court; neither does the fact that the provision in question relates only to fines, penalties and forfeitures imposed in the municipal court of Chicago bring the provision within the title of the act. Provisions relating to the procedure in the municipal court for the recovery of fines and penalties for the violation of park ordinances, and for the collection of such fines and penalties after they have been imposed, relate to the municipal court, but a provision as to the disposition of moneys collected from fines and penalties imposed in the municipal court no more relates to the municipal court than the disposition of moneys collected from fines and penalties imposed in other courts. In *People v. Roth*, 249 Ill. 532, we said: "The purpose

of the constitutional provision under consideration is to prevent legislation being enacted of which the title gives no hint. The requirement is for the benefit of the members of the General Assembly and of the people who are to be governed by such statutes." The title of the Municipal Court act gives no hint that the act contains any provision relating to the payment of moneys derived from fines and penalties to the city of Chicago for general corporate purposes or to certain boards of park commissioners. It follows that so much of section 58 of the Municipal Court act, as amended in 1907, as provided for the payment to the city of Chicago of one-half of all moneys collected upon judgments of the municipal court in cases for the violation of park ordinances and for the payment of the remaining one-half of such moneys to the board of park commissioners in whose favor such judgments were rendered was not within the title of the act and was therefore void.

On May 31, 1911, the legislature passed an act entitled "An act to provide for the setting apart, formation, administration and disbursement of a park police pension fund." This act became effective July 1, 1911. Section 1 of the act provides that "whenever any persons have been or may be appointed or otherwise selected as commissioners or officers and constitute a board of park commissioners for any one or more towns, whether said towns have heretofore existed or now exist under and in pursuance of any act or acts of the General Assembly of this State, for the purpose of locating, establishing, enclosing, improving or maintaining any public park, boulevard, driveway, highway or other public work or improvement, and such board of park commissioners shall have established a police force or department of police under the employ of such board of park commissioners, there shall be set apart the following moneys to constitute a police pension fund:

\* \* \* All fines and penalties collected for violations of

any of the ordinances of such board of park commissioners or of any of the laws of the State of Illinois as now in force, within the territory under the control of such board of park commissioners, in all cases in which arrests for violation of such law shall be made by officers of such police department." (Laws of 1911, p. 445.) By the adoption of this act the right of the superintendent of schools to have the moneys collected from fines and penalties imposed for the violation of the ordinances passed by the boards of park commissioners specified in the Park Police Pension Fund act ceased and determined, and as a necessary consequence it ceased to be the duty of the State's attorney of Cook county to collect such fines and penalties. He therefore had no right to a commission upon the moneys derived from fines and penalties imposed for the violation of park ordinances subsequent to July 1, 1911.

The Wayman estate contends that it has a prior right over all other claimants to so much of the fund in controversy as is required to satisfy the claim for uncollected fees of the State's attorney. Section 8 of the Fees and Salaries act, as amended in 1883, provided that the commission of ten per cent upon all moneys (except revenue) collected by the State's attorneys and paid over to the authorities entitled thereto, together with the fees provided for therein that should not be collected from the parties tried or examined, "shall be paid out of any fines and forfeited recognizances collected by them," and that "State's attorneys shall have a lien for their fees, on judgments for fines or forfeitures procured by them for their fees and earnings, until they are fully paid." This provision, in substance, has been embodied in all of the subsequent amendments of said section 8, and it must therefore be regarded as having been continuously in force since 1883. (Hurd's Stat. 1913, chap. 131, sec. 2; *Merlo v. Coal and Mining Co.* 258 Ill. 328; *People v. Cairo, Vincennes and*

*Chicago Railway Co.* 265 id. 634.) The various statutes under which the claimants other than the Wayman estate and the county superintendent of schools claim portions of the fund were all passed subsequent to 1883, and in order to hold that their claims (except the claims of the trustees of the various police pension funds) take precedence over the claim of the Wayman estate, it would be necessary to hold that the acts under which they claim were so repugnant to the provisions of said section 8 that those acts could not operate together with said section 8. (*Hoyne v. Danisch*, 264 Ill. 467.) Such, however, was not the case. The interest of the State's attorney in the fines and penalties collected by him is in the nature of a lien, and it might not be necessary for him to divert to the payment of his fees and commissions any of the moneys derived from fines and penalties imposed under such subsequent acts. Section 8 can therefore operate together with the subsequent acts, and it will consequently not be presumed that the legislature, by adopting the subsequent acts, intended to repeal the provisions of section 8 of the Fees and Salaries act giving State's attorneys the right to apply any fines and penalties collected by them to the payments of their uncollected fees. Such, in effect, was our holding in *Galpin v. City of Chicago*, *supra*.

So far as the fines collected for the violation of park ordinances since July 1, 1911, are concerned, as it was not the duty of the State's attorney either to prosecute the cases in which such fines or penalties were imposed or to enforce the collection of such fines and penalties, he had no right, under said section 8, to have the moneys derived from such fines or penalties applied towards the payment of his uncollected fees, and his estate is not entitled to any portion of the fund derived from such fines or penalties.

After awarding to the city of Chicago \$5272.32 and to Hale Gossart \$75 of the fund, and to the boards of trustees of the various police pension funds all that por-



tion of the fund collected since July 1, 1911, from fines or penalties imposed for the violation of park ordinances, and the interest received thereon by the clerk of the municipal court, the decree of the circuit court should have awarded to Elizabeth C. Wayman, as administratrix of the estate of John E. W. Wayman, so much of the fund as is necessary to satisfy the claim for uncollected fees of John E. W. Wayman, as State's attorney. Wayman had a vested interest in this fund at the time of his death, and upon his death the same passed to his personal representative. The case of *Galpin v. City of Chicago, supra*, controls with reference to the disposition of the remainder of the fund. The various claimants under the Truancy act, the Motor Vehicle act, the Pharmacy act, the Dentistry act, the Employment Offices and Agencies act and the Game act have equal rights to the balance of the principal of the fund remaining after the claim of the Wayman estate has been satisfied, and as such balance will not be sufficient to satisfy their claims in full, it should be prorated among them in accordance with their respective claims.

A controversy exists between the city of Chicago and the superintendent of schools as to the validity of section 57 of the Municipal Court act, which provides that all moneys collected upon judgments of the municipal court in criminal and *quasi* criminal cases shall be paid to the clerk, who shall first apply the same to the payment of the uncollected costs in criminal and *quasi* criminal cases. The claim of the city under this section of the Municipal Court act is subordinate to that of all other claimants herein except the superintendent of schools, (*Galpin v. City of Chicago, supra*), and as the fund will be entirely consumed in satisfying the demands of claimants whose claims are superior to that of the city, there will be no portion of the fund upon which this section can operate.

It will therefore not be necessary to consider the validity of said section 57 of the Municipal Court act.

With reference to the interest which accumulated in the hands of the clerk of the municipal court upon the moneys derived from fines and penalties, it should be divided into parts proportionately the same as the principal and distributed accordingly among those claimants found to be entitled to the principal. *Galpin v. City of Chicago, supra.*

The county of Cook urges that if we determine that the Wayman estate is entitled to that portion of the fund necessary to satisfy the claim of the State's attorney for uncollected fees, the \$38,400 paid to Wayman by the county as a salary during his term of office should be deducted from that portion of the fund awarded to the Wayman estate and should be ordered re-paid to the county. The Wayman estate contends that as Wayman during his term of office paid into the county treasury, from fees collected by him, a sum in excess of the amount paid him as salary, the county has no claim upon this fund or against the Wayman estate for any portion of the moneys paid Wayman as salary, and that in any event the question can not be determined in this suit. If, as contended by the county, it has a valid claim against the Wayman estate for the salary paid to Wayman under an invalid law, notwithstanding the fact that Wayman under the same law paid a larger sum to the county, it is strictly a legal claim, which can be enforced against his estate. The relief sought by the county in this respect cannot be awarded in this suit, the only question here being, "Who is entitled to the identical property brought into court?" *Dyas v. Dyas*, 231 Ill. 367.

The decree of the circuit court is reversed and the cause is remanded to that court, with directions to enter a decree in accordance with the views herein expressed.

*Reversed and remanded, with directions.*

THE CITY OF CHICAGO, Appellant, vs. THE SULLIVAN  
MACHINERY COMPANY *et al.* Appellees.

*Opinion filed June 24, 1915—Rehearing denied October 7, 1915.*

1. SPECIAL ASSESSMENTS—*what need not be included in district for construction of a sewer.* Incident to the power to construct a sewer system is the power to define the district which shall be permitted to drain into the main sewer, but no property need be included in the district where it is a physical impossibility to connect it with the sewer system proposed, notwithstanding the fact that such property will incidentally be benefited because the making of a new district will afford this property an adequate and sufficient outlet through its own sewer, which before the improvement suffered congestion.

2. SAME—*manner in which city has acquired easement not involved.* In a proceeding for the confirmation of a special assessment for a sewer, the question whether or not the city has acquired its easement in the manner provided by statute is not involved, where the city has acquired title sufficient to enable it to construct the improvement and the legality of the acquisition has not been questioned by any action brought against the city.

3. SAME—*effect where property is not described in the resolution nor condemnation provided for in the ordinance.* A city is entitled to a judgment of confirmation of a sewer assessment although certain property to be taken is not described in the resolution, as provided in section 7 of the Local Improvement act, nor its condemnation provided for by ordinance, where proceedings to condemn the property for a street have already been instituted in accordance with a prior local improvement ordinance and are prosecuted to judgment in apt time.

4. SAME—*meaning of section 53 of the Local Improvement act.* Section 53 of the Local Improvement act, which provides that no special assessment or special tax shall be levied for any local improvement until the land necessary therefor shall be acquired and in possession of the municipality, except in cases where the proceedings to acquire such land shall have been begun and proceeded to judgment, does not require that the title be acquired before the assessment roll is filed, but is complied with where the necessary title has been acquired before the confirmation of the assessment roll, as the assessment is not finally levied until it is confirmed.

5. SAME—*estimate for a sewer need not specify cost of restoring pavement.* The restoration of such pavement as must be de-

stroyed in constructing a sewer is a mere incident to the improvement and the cost of such restoration may be included in the estimate of the cost of the improvement, but it is not necessary that the estimate particularly specify such cost. (*Northwestern University v. Village of Wilmette*, 230 Ill. 80, followed.)

6. *SAME—how city may acquire easement for a public street.* Where a railroad company has duly accepted the provisions of a track elevation ordinance requiring the construction of a subway at a certain street, such action effectively conveys an easement to the city for a public street in the property within the railroad right of way and the line of the street, and a subsequent ordinance authorizing the construction of a sewer need not provide for the condemnation of such property, as the right to construct a sewer is included in the easement for a street.

7. *SAME—mortgagee need not be named as an owner.* The mortgagor or his assignee is the legal owner of the mortgaged property as against all persons except the mortgagee or his assigns, and in a proceeding under the Local Improvement act to condemn the property it is not necessary to name the mortgagee as owner, where the mortgagee is named as owner and occupant.

8. *PARTIES—distinction between the Eminent Domain act and Local Improvement act as to parties defendant.* Sections 13 to 33 of the Local Improvement act provide a complete code of procedure different from that of the Eminent Domain act for condemnation proceedings in making local improvements, and section 20 thereof provides that all owners and occupants of the property to be taken be named as parties defendant, while all interested otherwise be designated as "all whom it may concern."

APPEAL from the County Court of Cook county; the Hon. J. E. HILLSKOTTER, Judge, presiding.

PHILIP J. MCKENNA, and GEORGE P. FOSTER, (JOHN W. BECKWITH, Corporation Counsel, of counsel,) for appellant.

WILLIAM T. HAPEMAN, WILLIAM J. DONLIN, KNAPP & CAMPBELL, and ROYAL B. CUSHING, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county sustaining one of the legal objections made upon the application of the city of Chicago for the con-

firmation of a special assessment for the construction of a sewer.

A number of years ago when the section of the city in which the proposed sewer district is located was much more sparsely settled than at the present time a sewer district was created, which was known as the Twenty-second street district. This district was somewhat irregular in shape, but it may be described with fair accuracy as extending east and west from Paulina street to Hamlin avenue and north and south from Kinzie street to Twenty-sixth street. The main or trunk sewer serving this district extended east along Twenty-second street from Hamlin avenue to a point between Wood and Paulina streets and thence south to the Chicago river. At its outlet this main sewer is nine feet in diameter. Branch sewers extended from the main or trunk sewer to the north and south, serving the whole of the district. As this territory improved and became more densely populated the main sewer failed to afford an adequate outlet for the sewage and storm waters of the district. By reason of this situation that part of the territory lying between Hamlin avenue and Sacramento boulevard was detached from the district and organized into a separate sewer district, which is known as the Albany avenue district, and the old Twenty-second street sewer was thereafter used to serve as an outlet for that part of the original district lying east of Sacramento boulevard. In time the Twenty-second street sewer became inadequate as an outlet for the district as thus restricted. The ordinance here involved was then passed creating a sewer district of the territory lying between Sacramento boulevard and Oakley avenue, leaving as the territory remaining in the old Twenty-second street district that part of the original district lying between Oakley avenue on the west and Paulina street on the east, Polk street on the north and Twenty-second street on the south. By the ordinance here involved it is proposed to construct

a sewer in Rockwell street, and in Rockwell street produced, from the Chicago river north to Ogden avenue, thence west on Ogden avenue to Washtenaw avenue and thence north to Adams street, which, together with the necessary sub-mains and laterals, will drain all the territory within the new district.

A number of legal objections were filed, all of which were overruled except one. The objection sustained was, that all the property that would be benefited by the construction of the proposed sewer was not included within the district. The basis of this objection is that there is now congestion in that part of the original district which lies east of Oakley avenue by reason of the fact that the Twenty-second street sewer does not furnish an adequate outlet for the original district, and as the construction of the proposed Rockwell street sewer, with its laterals, in the new district will relieve this congestion and afford a sufficient and adequate outlet through the old Twenty-second street sewer for that portion of the district lying east of Oakley avenue, that territory should be included in the new district and should be assessed for benefits accruing to the property included in it, by reason of the abandonment of the Twenty-second street sewer as an outlet for the territory west of Oakley avenue.

It is conclusively shown by this record that the property east of Oakley avenue can never avail itself of the benefits of the Rockwell street sewer by attaching thereto, for the reason that none of the property east of Oakley avenue can be drained into the Rockwell street sewer. The only benefit to the property east of Oakley avenue, if any, is occasioned by the fact that the territory west of it has abandoned the Twenty-second street sewer as an outlet and thus made that sewer more efficient as an outlet for the territory east of Oakley avenue. Although this is the first time this precise question has been presented to us for decision, we have many times been called upon to determine

under what circumstances property is liable for assessment for the construction of a sewer. Incident to the power to construct a system of drains and sewers is the definition of the district which shall be permitted to drain into the main sewer. (*Gray v. Town of Cicero*, 177 Ill. 459; *Duane v. City of Chicago*, 198 id. 471.) While it is true that property may be benefited which is not immediately reached by a sewer, this is only when the ordinance is of such a character as to make possible a connection between the property and the outlet, with some provision permitting the property owner to use such outlet in the future. We have repeatedly held that no assessment based upon a prospect of a future connection with a sewer is valid unless a drainage district is created which will drain into such sewer and some provision is made which will eventually effect such connection with the property assessed, or the property owner is assured that he will in some way be entitled to the benefit of the sewer. (*Title and Trust Co. v. City of Chicago*, 162 Ill. 505; *Gray v. Town of Cicero*, *supra*; *Mason v. City of Chicago*, 178 Ill. 499; *Bickerdike v. City of Chicago*, 185 id. 280; *Snydacker v. Village of West Hammond*, 225 id. 154; *City of Lawrenceville v. Hennessey*, 244 id. 464.) It cannot be contended that the property east of Oakley avenue is benefited by any present use of the sewer or by any assured future use of such a nature that the owners can enforce their rights and thereby secure the benefits, as it is a physical impossibility to drain this territory into the Rockwell street sewer. As has been stated, the benefits which it is claimed will accrue to the territory east of Oakley avenue by reason of the construction of the Rockwell street sewer arise, not because this territory can ever be connected with the proposed sewer, but because, as an incident to the construction of the proposed sewer, the territory lying west of Oakley avenue will abandon the old Twenty-second street sewer as an outlet and thus afford the territory on the east adequate and suf-

ficient outlet for its sewage. Such benefits, if any, would not warrant the inclusion of this territory within the new district. It is improper to include within a sewer district any property which will not have either the present or the future opportunity of connecting with the system of sewers to be constructed to serve the district. The property east of Oakley avenue would be benefited precisely the same if the Twenty-second street sewer had been abandoned by the other portion of the territory for any other reason than the one which now prompts the abandonment.

Appellees insist that a portion of the territory within the new district is in the same situation as the property east of Oakley avenue, and in support of this claim point out that it is proposed to serve a portion of the new district with a sewer at present in Western avenue,—a street running north and south a short distance west of Oakley avenue,—which sewer empties into the Twenty-second street sewer at the junction of said Western avenue and Twenty-second street. While it may be proposed, for the time being, to serve that portion of the territory west of Oakley avenue and in the vicinity of Western avenue with the present lateral sewer, that property is all within the territory which can be drained into the Rockwell street sewer and which it is proposed will ultimately be connected with that sewer. In that respect it is different from the property east of Oakley avenue, which under no circumstances can drain into the Rockwell street sewer. The court erred in sustaining this objection.

Among the legal objections made, and overruled by the court, are the following: (1) That the first resolution of the board of local improvements does not describe the property which is necessary to be taken for the improvement; (2) that the easements in or deeds for the property procured by the city are not sufficient; (3) that the track elevation ordinances offered in evidence by the city do not give the city any right or authority to construct this



sewer under the tracks of the Chicago, Burlington and Quincy Railroad Company; (4) that the city has not complied with section 53 of the Local Improvement act by acquiring its title to the land necessary for the improvement prior to the filing of the assessment roll; and (5) that the ordinance is unreasonable and void for the reason that in a part of Rockwell street, and in other streets where it is proposed to construct a sewer, there is now good pavement in place and there is no item in the estimate or any provision in the ordinance for the restoration of such pavement. Appellees have assigned cross-errors upon the action of the court in overruling these objections.

The first resolution originating this improvement was dated November 1, 1910, and the date of the hearing at which the second resolution was passed was November 15, 1910. The ordinance authorizing the proposed improvement was passed May 22, 1911. Rockwell street does not extend further south than Twenty-sixth street, which is some distance north of the west branch of the south branch of the Chicago river, which is the outlet for the sewer. The fee of the property in Rockwell street produced south to this branch of the river was in the International Harvester Company. On March 14, 1910, a track elevation ordinance was passed by the council of the city of Chicago requiring the Illinois Northern Railway Company and other railway companies therein named to change the plane of certain of their railroad tracks within the city of Chicago. By this ordinance the Illinois Northern Railway Company was required to procure, at its own expense, an easement running through the city from the intersection of West Twenty-sixth street and South Rockwell street to a point on the north bank of the west fork of the south branch of the Chicago river, which latter point should be in the center of South Rockwell street produced in order to enable the city to construct and maintain a closed sewer beneath the surface of the land so traversed. Thereafter

the Illinois Northern Railway Company duly accepted the provisions of this ordinance by a written instrument under seal, which was filed with the city clerk, and on July 18, 1910, the International Harvester Company, the owner of the fee, in pursuance of the provisions of that ordinance, duly granted and conveyed to the city of Chicago the easement therein mentioned and provided for. It is contended that the acquiring of titles or easements by a city by private negotiation and contract is, in such a case as the one here presented, illegal and void, and that the city must acquire title in the manner provided by the statute. Whether the city had the right to acquire this easement in the manner in which it was acquired is not involved in this proceeding. It had acquired such title as it had, prior to the adoption of the first resolution originating this improvement. The conveyance to the city by the International Harvester Company divested the grantor of such title as it conveyed and vested the same in the city, and the legality of this purchase has not been questioned by any action brought against the city of Chicago. As the ordinance merely provides for the construction of this sewer through property so acquired by the city and to which it has acquired title sufficient to enable it to so construct the improvement, it is not defective or subject to this objection. *Snydacker v. Village of West Hammond, supra.*

On January 24, 1898, the council of the city of Chicago passed a track elevation ordinance covering the main line of the Chicago, Burlington and Quincy Railroad Company from the west line of the city limits eastward to Laflin street, and on September 3, 1907, a supplemental ordinance was passed covering the track elevation of portions of the same line, which included the construction of a subway under the tracks of this company where such tracks are intersected by Rockwell street, the construction of the same to be at the expense of the railroad company. The railroad company accepted the provisions of the origi-

nal ordinance on February 21, 1898, and accepted the provisions of the supplemental ordinance on October 12, 1907. It was not necessary to describe the property within the right of way of the Chicago, Burlington and Quincy Railroad Company and in the line of Rockwell street in the first resolution originating the improvement or to provide for its condemnation in the ordinance. The execution by the railroad company of its acceptance of the provisions of the track elevation ordinances by its proper officials and under seal effectively conveyed the easement to the city of Chicago in this property for a public street. This same question was involved in *City of Chicago v. Walker*, 251 Ill. 629, in reference to this identical property. In that case the city of Chicago was proceeding, under the Local Improvement act, for the opening of South Rockwell street from West Eighteenth place to West Nineteenth place, which included this property. It was there held that it was not necessary for the ordinance authorizing the improvement to provide, by condemnation or otherwise, for acquiring the right to cross the right of way of the railroad company where it was intersected by the proposed street, as that was rendered unnecessary by the passage of the track elevation ordinances herein referred to, which expressly provide for a subway to be constructed at this point, and the acceptance of those ordinances by the railroad company. It was there held that when the proposed improvement and the track elevation ordinances are considered together, it is clear that provision had been made by the city for the entire improvement and there existed no reason why such improvement could not be made and paid for by special assessment. It will thus be seen that prior to November 1, 1910, the date of the first resolution originating the proposed improvement, the city had acquired a perpetual easement in the lands of the International Harvester Company within the line of Rockwell street produced south to the Chicago river, and that a sub-

way was provided for across the right of way and under the tracks of the Chicago, Burlington and Quincy Railroad Company at Rockwell street. It cannot be successfully contended that the city does not have the right to construct a sewer in a street thus acquired, as that is one of the acknowledged uses to which such an easement can be put.

On November 1, 1910, the date of the first resolution, there were pending in the circuit court of Cook county condemnation proceedings for the opening of Rockwell street from Nineteenth street north to the right of way of the Chicago, Burlington and Quincy Railroad Company, being the proceedings involved in *City of Chicago v. Walker, supra*. As the city had not acquired title to that strip on that date, it is contended that the first resolution should have described this property as necessary to be taken for the improvement, in accordance with the provisions of section 7 of the Local Improvement act, which requires the resolution to describe the property proposed to be taken whenever the proposed improvement will require that private property be taken or damaged. Proceedings were already pending for the condemnation of this property to be used as a public street, under the provisions of a prior ordinance creating a local improvement. Under these circumstances it was not necessary to describe this property in the first resolution or provide for its condemnation by the ordinance. Had this procedure been followed the city would have been placed in the anomalous position of prosecuting two separate and distinct proceedings for the condemnation of the same property for the same use. Under the ordinance here involved the city had a right to proceed and to have an order of confirmation of the assessment entered, provided the condemnation proceedings instituted in accordance with the prior local improvement ordinance were prosecuted to a judgment in apt time.

It is in reference to the above tract that the objection was made that the city had not complied with section 53

of the Local Improvement act by acquiring title to the land necessary to the improvement prior to the filing of the assessment roll. Section 53 does not provide that such title must be acquired before the filing of the assessment roll. That section of the Local Improvement act provides that no special assessment or special tax shall be levied for any local improvement until the land necessary therefor shall be acquired and in possession of the municipality, except in cases where proceedings to acquire such land shall have been begun and proceeded to judgment. Appellees assume that the assessment is levied upon the filing of the assessment roll, while appellants, on the other hand, contend that the assessment is not levied until the order of confirmation is entered. The proceeding for the condemnation of this tract had not proceeded to judgment before the filing of the assessment roll. The petition for condemnation was filed September 2, 1910, and final judgment was obtained September 16, 1913. The cases cited by appellees in support of this contention are not in point as they do not determine the question of the time when the assessment is actually levied. The provisions of said section 53 are complied with where the necessary title has been secured by a municipality before the hearing upon the application for the confirmation of the assessment roll, as the assessment is not finally levied until the order confirming the assessment roll has been entered.

It is further objected in this connection that the city has not acquired title to this tract for the reason that prior to the institution of the condemnation proceedings by the city on February 2, 1910, all the property of the Chicago, Burlington and Quincy Railroad Company had been conveyed by trust deed to the New England Trust Company to secure an indebtedness therein mentioned, and the trustee was not made a party defendant in the condemnation proceedings. In support of their contention that this constitutes a fatal omission the appellees cite and rely upon cases

decided under the Eminent Domain act. The decisions under that act are not applicable to the question here presented. The condemnation proceedings here involved were instituted pursuant to the provisions of the Local Improvement act. That act is separate and distinct from the Eminent Domain act and differs from that act in the practice and procedure prescribed. The Local Improvement act entirely regulates condemnation proceedings instituted thereunder without resort to any other act, and sections 13 to 33 thereof provide a complete code of procedure different from that of the Eminent Domain act. (*Rieker v. City of Danville*, 204 Ill. 191.) Section 20 of the Local Improvement act provides that every person who shall be named in the commissioners' report as an owner of property to be taken or damaged for the improvement, and every person who shall be named as an occupant of any parcel thereof, shall be made a party defendant in the condemnation proceeding, and that all other persons having or claiming interests in any of said premises shall be described and designated as "all whom it may concern," and by that description shall be made defendants. The Chicago, Burlington and Quincy Railroad Company was made a party defendant as the owner of this tract of land and as the occupant thereof. The New England Trust Company was not made a party defendant by name, but it is not controverted that section 20 of the Local Improvement act was complied with and all persons other than the owner and occupant who had or claimed to have any interest in the property were made parties defendant under the description of "all whom it may concern." The contention of appellees is that the New England Trust Company was the owner of the property, as by the trust deed given it to secure the indebtedness of the railroad company the legal title was conveyed to it. It is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged property as against all persons except the mortgagee or his assigns.

(*Hall v. Lance*, 25 Ill. 250; *Emory v. Keighan*, 88 id. 482; *Lightcap v. Bradley*, 186 id. 510.) "The mortgagee is the legal owner for only one purpose, while, at the same time, the mortgagor is the owner for every other purpose and against every other person. The title of the mortgagee is anomalous, and exists only between him and the mortgagor and for a limited purpose." (*Lightcap v. Bradley*, *supra*.) In the light of these decisions the mortgagee, the New England Trust Company, was not an owner as against the city of Chicago, and under the provisions of the Local Improvement act the city was not required to make it a defendant by name in the condemnation proceeding. It was properly made a defendant under the general description of "all whom it may concern." The condemnation proceeding having been regular and due notice having been given to all those having an interest in the property, the city, upon the entry of final judgment, became vested with a complete title, and the easement thus acquired is good against the mortgagee as well as the mortgagor of the property involved.

Under the objection that there is no item in the estimate or any provision in the ordinance for the restoration of the pavements in Rockwell street and other streets where it is proposed to construct the sewer, it is contended that the ordinance is unreasonable because the destruction and restoration of good and serviceable pavement are involved; that this will involve the repair of such pavement, and that an assessment cannot be made for the purpose of repairing pavements or re-paving streets on which the existing pavements are good. In support of this contention appellees cite and rely upon a line of cases which hold, in effect, that a new pavement cannot be substituted for one which is perfectly good and serviceable, by special assessment proceedings. These decisions were all rendered in cases where municipalities had instituted proceedings for the paving of streets where the existing pavements were in a good and

serviceable condition or where the pavement was provided for in other ordinances under which contracts had been let. In this case it is not sought to levy an assessment for a new pavement. The tearing up of such pavement as must be destroyed is a mere incident to the construction of the sewer and is necessary in order to accomplish the purpose of the ordinance. The ordinance would entirely fail of its purpose if it were not possible to tear up the surface of the ground where it is proposed to construct the sewer. It cannot be regarded as levying an assessment for a new pavement or for repairing pavements to include the cost of restoring the pavements necessarily torn up in excavating for the sewer. In passing upon a similar question in *Northwestern University v. Village of Wilmette*, 230 Ill. 80, we said: "We think it clear that the cost of re-paving streets torn up in excavating for the sewers and removing surplus earth placed upon the streets of the village during the construction of the sewers is included in the estimate of the cost of the improvement, as, obviously, the improvement would not be put in in a good and workmanlike manner if the portions of the streets where sewers were laid were left unpaved and the earth excavated and not used for re-filling remained in the streets as an obstruction to travel," and it was there held that the improvement would not be completed until the pavement necessarily torn up had been replaced. It was not necessary that the estimate should specify the cost of re-paving streets, and the court did not err in overruling this objection.

For the error indicated the judgment of the county court is reversed and the cause remanded to that court for such further proceedings as will be consistent with the view herein expressed.

*Reversed and remanded.*



ANNA BELLINGER *et al.* Appellants, *vs.* JOHN F. DEVINE,  
Admr. *et al.* Appellees.

*Opinion filed June 24, 1915—Rehearing denied October 7, 1915.*

1. PRACTICE—*section 61 of Practice act construed.* Section 61 of the Practice act, relating to the submission to the court of propositions of law and findings of fact in cases tried by the court without a jury, applies only to cases where the parties are entitled to a jury but waive that right and agree to a trial by the court.

2. SAME—*when section 61 of the Practice act does not apply.* A proceeding by petition to set aside an order approving a children's award is not within the constitutional guaranty of the right to trial by jury, and hence the provisions of section 61 of the Practice act concerning the submission of propositions of law and findings of fact do not apply, and in such case the whole record is before the Supreme Court for review, without restriction to the action of the trial court on propositions of law or findings of fact.

3. EVIDENCE—*genuineness of signature is not to be determined solely by comparison with one admitted to be genuine.* Whether the signature to an application for a marriage license is genuine will not be determined solely by comparing such signature with one admitted to be genuine, but all the facts and circumstances appearing in the case will be considered, in connection with this evidence, in determining the question.

4. SAME—*what evidence does not prove that party participated in marriage ceremony.* Testimony that the deceased, at the time his supposed wife died, took possession of a tin box and some papers which were in her room, and that after the deceased died a tin box was produced by an inspector of police containing a marriage certificate bearing the names of the deceased and of his supposed wife, does not prove that the deceased participated in the marriage ceremony, where the box introduced in evidence is not identified as the one the deceased took possession of, and there is no proof that the box containing the marriage certificate was found among the effects of the deceased at his death or how it got into the possession of the police inspector.

5. SAME—*statements by deceased recognizing children as his own are admissible against the persons claiming as heirs-at-law.* Statements by a person, since deceased, that a certain woman was his wife and that her children were his are admissible as declarations against interest, since he thereby assumes the responsibility of a father and becomes liable for their support, and being admissible against the declarant in any suit in which he might be a

party and in which such an investigation is pertinent, they are admissible against his heirs-at-law in a proceeding by them to set aside an award by the probate court to such children.

6. *SAME*—when no presumption is necessary to prove identity of applicant for marriage license. The fact that there are mis-statements as to parentage and place and date of birth of an applicant for a marriage license in the application supposed to bear his signature does not render it necessary to indulge in any presumptions in order to overcome the effect of such mis-statements, where there is sufficient competent evidence in the record to show, notwithstanding these mis-statements, that the deceased was, in fact, the person who made the application.

7. *DIVORCE*—neither the bill nor publication notice need give the full name of the complainant. The fact that in the bill for divorce and in the publication notice the complainant is described as "B. N. Riggs" whereas she is known as "Beatrice K. Riggs" does not affect the jurisdiction of the court where the name of the defendant is properly given; and this is true though the statute as to service by publication requires the published notice to state "the names of the parties."

8. *NAMES*—middle initial is not part of a name. The common law recognizes but one christian name, and the presence or absence of a middle initial, or a mistake in regard thereto, is not material. (*Illinois Central Railroad Co. v. Hasenwinkle*, 232 Ill. 224, followed.)

APPEAL from the Circuit Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding.

KING, BROWER & HURLBUT, (SAMUEL B. KING, of counsel,) for appellants.

A. A. ROLF, (A. E. STEIN, of counsel,) for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

Levi A. Raven died intestate in the city of Chicago in the month of March, 1911. He had for a number of years been a resident of that city and was engaged in business there at 1425 State street. Letters of administration on his estate were granted to the public administrator on April 1, 1911. On May 15, 1911, a children's award in

the sum of \$1500 was made in the probate court of Cook county to Lewis A. Raven and Frances May Raven Wall, as minor children of the deceased. Thereafter the appellants, Anna Bellinger and Esther Raven, sisters of Levi A. Raven, filed their petition in the probate court of Cook county, praying that they be adjudged to be his only heirs-at-law and next of kin and that the order approving the children's award be set aside. From the order of the probate court denying the petition appellants appealed to the circuit court of Cook county, and upon a hearing in the circuit court the petition was dismissed. From that judgment this appeal has been perfected, the case having been brought directly to this court for the reason that a freehold is involved.

Upon the trial in the circuit court propositions of law and findings of fact were submitted to and passed upon by the court on behalf of appellants, and various assignments of error are predicated upon the action of the court in holding, and in refusing to hold, various of the propositions and findings thus submitted. The provision of section 61 of the Practice act relating to the submission to the court of propositions of law and findings of fact in cases tried by the court without a jury applies only to cases where the parties are entitled to a jury trial but waive that right and agree to a trial before the court without the intervention of a jury. (*People v. Chicago, Burlington and Quincy Railroad Co.* 231 Ill. 112; *Schofield v. Thomas*, 236 id. 417.) This proceeding was unknown to the common law and therefore does not come within the constitutional guaranty of the right to trial by jury. As the statute does not expressly provide for a trial by jury in this class of cases the parties were not entitled to have a jury trial, and the cause must necessarily be tried by the court unless the court should, in its discretion, order a trial by jury. (Hurd's Stat. 1913, chap. 37, par. 222.) The provision of the Practice act relating to the submis-

sion of propositions of law and findings of fact does not apply, and the action of the court in holding, or refusing to hold, any of the propositions or findings submitted presents no question for review. The whole record is before us, and our inquiry as to the correctness of the judgment entered is not restricted or in any way governed by the propositions of law or findings of fact held or refused by the court.

It is not contradicted that Levi A. Raven was born in England on February 18, 1850, and was the son of William Raven, a tailor by trade, and Hephzibah Raven, (*nee* Prime,) both of whom were born in Willingham, Cambridgeshire, England, and that appellants are his only surviving sisters, his brothers and other sisters having died prior to his decease, without issue. The evidence introduced on behalf of appellants tended to prove that they were in frequent communication with Raven during his lifetime and were the recipients of his bounty; that they had never heard that he had contracted a marriage with any person until the claim of the existence of a marriage was made after his death, and that in the presence of others, at a time after it is alleged his marriage took place, Raven stated to them that he had never been married. The claim on the part of the appellees Lewis A. Raven and Frances May Raven Wall is, that Levi A. Raven was married to their mother, Beatrice K. Riggs, at Hammond, Indiana, on October 15, 1906. The contentions of the parties can be best understood by giving a chronological statement of the facts which the evidence on their behalf tends to prove.

Beatrice K. Riggs was a native of Ireland, and her maiden name was Bridget Kilmartin. She came to the United States when about twenty-two years of age, and under the name of Bridget Kilmartin was married to Patrick Cunningham in the State of Iowa. It is conceded that she was divorced from Cunningham, and she thereafter, in

1888, contracted a marriage with John W. Riggs, a negro, of the city of Chicago. Some time after her marriage with Cunningham she discarded the name of Bridget and assumed the name of Beatrice instead, and was thereafter until her death known by that name. Levi A. Raven was engaged in the manufacture and sale of a stock food or condition powder at 1425 State street, in the city of Chicago. About the year 1898 Riggs entered the employ of Raven as a driver of one of his teams and remained in his employ for some time thereafter. It does not clearly appear from the record just when he ceased working for Raven. In 1900 Beatrice K. Riggs, under the name of B. N. Riggs, secured a decree of divorce from Riggs in Cook county. Raven evidently became acquainted with Mrs. Riggs during the time her husband was employed by him and meretricious sexual relations were established between them. On December 5, 1904, Mrs. Riggs gave birth to appellee Lewis A. Raven, and on December 28, 1904, filed her complaint before a justice of the peace of Cook county against Levi A. Raven on a charge of bastardy. On September 22, 1904, she filed her declaration in a suit for breach of promise which she had theretofore instituted against Raven in the superior court of Cook county, wherein she charged that he had promised to marry her but had refused to do so. As a result of the bastardy complaint Raven was placed under bonds for his appearance in the criminal court of Cook county. Thereafter, on January 5, 1906, by a written settlement agreement entered into between Raven and Mrs. Riggs, the bastardy charge and the suit for breach of promise were settled. In and by this settlement it was agreed that Raven should pay Mrs. Riggs \$20 upon that date and \$20 on the first of each month thereafter until December 1, 1910, and \$10 per month on the first day of January, 1911, and on the first day of each month thereafter until December 1, 1915. Raven further agreed to convey to Mrs. Riggs, by warranty deed, a resi-

dence property described therein for the period of her natural life, with remainder in fee simple to the child, to whom she had given the name of Lewis Alfred Raven, his heirs and assigns. The agreement contained, among others, the following recital: "Nothing herein contained, or in any of the instruments or acts done in pursuance thereof, shall be deemed an assent by Levi A. Raven to the assumption by said child of Beatrice K. Riggs of the name of Raven or a recognition of his right to bear said name." Raven made the conveyance of the real estate agreed to be conveyed, pursuant to this agreement. The record is silent as to the payment of the sums of money therein provided to be paid. Some time after this settlement was made the meretricious relations of Raven and Mrs. Riggs were resumed. On October 9, 1906, application was made by Beatrice K. Riggs and one representing himself to be Levi A. Raven to the clerk of the circuit court of Lake county, Indiana, for a marriage license. The laws of the State of Indiana having been complied with in making the application, a license was issued and a marriage ceremony was performed on October 15 by W. A. Jordan, a justice of the peace at Hammond, Indiana, who duly made return of the fact that he had performed this ceremony to the clerk of the circuit court.

The only question to be determined is whether the deceased was the Levi A. Raven who made application for the marriage license in Lake county, Indiana, and was united in marriage with Beatrice K. Riggs before justice of the peace Jordan. There is no proof that either Levi A. Raven, deceased, or Beatrice K. Riggs was in Hammond or any other part of Lake county, either on the 9th or 15th of October, 1906, or at any other time, other than the record proof in reference to the marriage. It is not denied, however, that the female application for the marriage license was signed by Beatrice K. Riggs or that the signature to her application is her genuine signature. It

is denied on the part of appellants that the deceased was the same Levi A. Raven who signed the male application. Neither the clerk nor the justice of the peace has any independent recollection of the issuance of the marriage license or the performing of the marriage ceremony. The only knowledge they have is that shown from the records. In the application for the marriage license on the part of the male, Levi A. Raven is described as having been born in the State of New York on October 31, 1851. His residence is given as Chicago and his occupation as a merchant. The full name of his father is given as John F. Raven, his birthplace as New Jersey and his occupation that of a farmer. The maiden name of his mother is given as Mary A. Drake, her birthplace New Jersey, and it is stated that both of his parents are dead. The application then states that this is not his first marriage; that he had been married once before, and that that marriage had been dissolved by death in 1901. It will thus be seen that this description does not identify the deceased as the Levi A. Raven who made the application. This application was signed and sworn to, and under the laws of Indiana it was a criminal offense to make a false statement in an application for a marriage license.

A photographic copy of this application, containing the signature "Levi A. Raven" to the application and to the oath attached thereto, was admitted in evidence. Witnesses who were familiar with the handwriting of Levi A. Raven inspected the original application and also the photographic copy. Handwriting experts also inspected the original application, the photographic copy thereof, and various checks and other papers containing the admittedly genuine signature of the deceased. Kate McDonald, who for many years had been in the employ of Raven and was familiar with his handwriting, testified that the signatures attached to the application for the marriage license and to the oath attached thereto were not his genuine signatures.

A number of handwriting experts testified on behalf of appellants, from their comparison of these signatures with the admittedly genuine signatures of Raven, that the signatures on the application were not his genuine signatures. One handwriting expert testified on behalf of the appellees that in his judgment the signatures on the application were the genuine signatures of Levi A. Raven. This witness testified that while these signatures were not similar to the admittedly genuine signatures of Levi A. Raven, they were all written by the same person, and that the signatures found on the application were evidently written by one attempting to disguise his handwriting. In support of this conclusion he called attention to a number of points of similarity which he claims were due to the unconscious exercise of peculiarities and habits by the writer. Original exhibits, consisting of a letter, a number of checks, the original agreement entered into between Raven and Mrs. Riggs on January 5, 1906, the written consent of Raven to the adoption by Mrs. A. R. Wall and her husband of his infant daughter, Frances May Raven, all of them containing the admittedly genuine signatures of Raven and being the same examined by the various witnesses, and the photographic copy of the male application for a marriage license, have been certified up by the trial court for our inspection. While the signatures to the application for marriage license are quite unlike the signatures which are admitted to be genuine, there are some points of similarity. Whether the deceased signed the name Levi A. Raven to the application for a marriage license should not, however, be determined from this evidence alone, but all the facts and circumstances appearing in the case should be considered in connection with this evidence in determining whether Levi A. Raven, the deceased, made this application for a marriage license.

The record does not disclose the circumstances under which Levi A. Raven died, but it is intimated that he was



supposed to have been murdered. An attorney representing the public administrator testified on behalf of appellees that in the early part of April he called on Inspector Wheeler at the Harrison street police station, who turned over to him a tin box, in which the witness found a marriage certificate executed by W. A. Jordan, a justice of the peace, certifying that he had united in marriage Levi A. Raven and Beatrice K. Riggs on October 15, 1906; that in this box there were other miscellaneous papers, one of which was a grammar-school diploma in the name of Olive Raven, a daughter of Beatrice K. Riggs. Assuming that this marriage certificate was found among the effects of Levi A. Raven, deceased, appellees argue that it is strong proof of the fact that the deceased was the Levi A. Raven who applied for the marriage license in Lake county, Indiana, and was united in marriage with Beatrice K. Riggs by the justice of the peace, Jordan. Appellees failed to show, however, that this tin box containing the marriage certificate was found among the effects of Levi A. Raven after his death. The attorney for the public administrator testified that he had received it from Inspector Wheeler. No member of the police department was called to show how this box came into the possession of the department. Beatrice K. Raven, who will be hereinafter referred to by that name, died about July 4, 1908, after having given birth to appellee Frances May Raven Wall on July 1, 1908. At the time of her death she was attended by a nurse, who testified that immediately after her death Levi A. Raven, the deceased, took possession of a tin box and some papers which were in the room in which Mrs. Raven died. She did not notice the box closely, however, and was unable to identify the box produced on the trial as the one the deceased took away with him. If, as appellees claim, this box containing the marriage certificate was kept in the possession of the deceased from the time of the death of their mother until the death of Levi A. Raven and was found

among his effects after his death, it would be strongly corroborative of their contention that the deceased was the Levi A. Raven who was united in marriage with their mother at Hammond, Indiana, October 15, 1906. Without any proof as to how this box came into the possession of Inspector Wheeler the possession of the marriage certificate by the deceased is not shown, and this proof is not helpful in determining the identity of the Levi A. Raven who participated in the marriage ceremony at Hammond.

After the alleged marriage of Raven to Mrs. Riggs he continued his relations with her as theretofore. During that time she resided in the premises conveyed to her as a result of the settlement made January 5, 1906. These premises were nine or ten miles from the place of business of the deceased. During this time Raven continued to sleep in his store on State street, as he had done theretofore, and took his meals at a boarding house next door. He frequently visited Mrs. Raven, however, and it is shown that he contributed to the support of the family, which consisted of Mrs. Raven, the boy Lewis A. Raven, and a daughter, Olive, who was alleged in the proceedings for divorce against John W. Riggs to be the daughter of Riggs but who testified in this proceeding that the name of her father was Andrew Sanchez. Prior to the birth of the child Frances May Raven Wall the mother was ill for some time, and the evidence tends to show that during that time Raven visited her daily for a period of six weeks.

Mrs. A. R. Wall, who with her husband afterward adopted the child Frances and who resided in the same building with Mrs. Raven, testified that she met Raven there on various occasions and that he had addressed his alleged wife as "Mrs. Raven." After the death of Mrs. Raven, Levi A. Raven at once importuned Mrs. Wall to take charge of the baby, Frances, and care for her. An arrangement was made whereby Mrs. Wall agreed to take care of the child for a consideration to be paid by Raven.

Later, when the little girl was about a year and a half old, proceedings were instituted in the county court of Cook county by Mrs. Wall and her husband to adopt the child, who was designated in these proceedings as "Frances May Raven." The statutory notice was served upon Raven, who was designated as the father of the child, and he thereupon, on December 23, 1909, subscribed and swore to the following receipt of notice and consent of adoption: "This will certify that I have this day received a copy of the above notice, and I hereby consent that a decree may be entered for the legal adoption of my said daughter, Frances May Raven, by A. R. Wall and John Wall, her husband."

Immediately upon the death of Mrs. Raven, Levi A. Raven secured the services of William W. Fern, an undertaker, to whom he stated that he wanted to purchase a casket for his wife. The casket was purchased, the funeral arrangements made, and the expense of the same was paid by Raven. August Yandel, a grocer, testified that he went to Raven's office to collect a grocery bill owing by Mrs. Raven at the time of her death, and that Raven told him he had given his wife the money to pay the bill and she should have paid it. Immediately after the death of Mrs. Raven, Levi A. Raven changed his method of living and took up his residence at 2952 South Park avenue, in the city of Chicago, to which place he removed the girl known as Olive Raven and the boy, Lewis A. Raven. These three lived there together, constituting the family, until the time of Raven's death.

Madeline Nielsen, a girl fifteen years of age, testified that she lived at 2946 South Park avenue in 1908; that she knew Raven and the two children; that the week after Raven moved to 2952 South Park avenue he stated to her that his wife had died a month before and on account of her death it was lonesome for Olive and the little boy. Martha Nielsen, a sister of Madeline Nielsen, testified that

on one occasion when Olive was sick she went there to prepare supper for Raven; that while there he said to her, "Olive hasn't been herself since my wife died," and that he referred to his wife as the mother of the two children. Mrs. Lizzie Doherty testified that she was a tenant of Raven; that in 1910, while riding with him and the little boy, in speaking of Olive he said, "My wife was so headstrong you couldn't tell her anything, and Olive is just like her;" also that during the summer of that year she had a conversation with the deceased in his home, in which he stated, referring to a picture standing upon the piano, "This is my wife, Mrs. Doherty; who does Buzzy [a nickname for the boy, Lewis,] favor?—me or his mother?" also that in the fall of that year he stated to her, "My wife died and I bought this place for a home for Olive and Buzzy." Louis Rosenberg testified that on one occasion when he was calling on Olive, Raven, in Olive's presence, referred to a picture of Olive's mother, which was standing on the piano, as that of his wife.

It is contended on behalf of appellants that the above statements made by Levi A. Raven after the death of Mrs. Raven, and after such relationship as they had sustained had ceased, were incompetent. We are clearly of the opinion that these statements were properly admitted as declarations made by Raven against his interest. If no marriage relation existed the appellees were the illegitimate children of Beatrice K. Riggs and Raven sustained no further responsibility concerning them than that imposed by the Bastardy act. By stating that the mother of these children was his wife he admitted his status as the legal parent of these two children and thereby assumed all the obligations of a father towards them. He was liable for their support and maintenance during minority, and thereafter if for any reason they were incapable of supporting themselves, and he was obliged to see that these children would never become a charge upon the public. Being declarations made

against his interest, they were admissible against him in any suit in which he might be a party and such an investigation be pertinent, and being admissible against him they were admissible as against his sisters, who in this proceeding claim to be his heirs-at-law.

It is not necessary, as the appellants contend, to base a presumption upon a presumption in order to establish the identity of the applicant for the marriage license in Lake county, Indiana, as that of the deceased. It is conclusively shown from this record that the parentage of the deceased was improperly stated in the application and his own birth-place and the date of his birth were not given correctly. It is not necessary to indulge in any presumptions in order to overcome the effect of the statements contained in the application for the marriage license. The only question is whether there is sufficient competent evidence in the record to show, notwithstanding these mis-statements, that Levi A. Raven, the deceased, was the person who made this application for a marriage license.

From the whole evidence we are of the opinion that the court properly found the issues for appellees and dismissed the petition. While it is true, as appellants contend, that sexual relations shown to have been meretricious in their inception are presumed to continue meretricious until they are proven to be matrimonial, and that cohabitation does not create a presumption of marriage unless matrimonial association and matrimonial habits be proved, we think there is sufficient proof in the record to satisfactorily establish the marriage of Levi A. Raven with Beatrice K. Riggs on October 15, 1906. The facts that Raven addressed her as "Mrs. Raven" in the presence of Mrs. Wall; that he supported the family; that he took charge of the two children, Olive and Lewis, after the death of their mother and made a home for them; that he recognized Frances May Raven as his legal offspring and consented, as her father, to her adoption by Mrs. Wall,

together with all the other facts shown, are sufficient to establish the identity of the Levi A. Raven who secured the marriage license in Lake county, Indiana, and thereafter was united in marriage with Beatrice K. Riggs at Hammond, with that of Levi A. Raven, the deceased.

At the time of the settlement of the bastardy proceeding Levi A. Raven was particular to have it expressly stated that he had not consented to the child Lewis assuming the name of Raven and disclaimed the right of the child to bear that name. At that time he was carefully guarding what he considered to be his rights. If, as appellants contend, no marriage ceremony had ever been performed between Raven and Beatrice K. Riggs, the child born July 1, 1908, had no further claim upon Raven and bore no different relationship to him than the child Lewis A. Raven. We find the deceased, however, assuming an entirely different attitude towards this child. He freely acknowledged himself as the legal father of the child, consented, as such father, to its adoption by Mr. and Mrs. Wall, and recognized the name of this child to be Frances May Raven.

The testimony of the appellants that their brother had stated to them that he had never been married is explained by the testimony of Mrs. Wail, who says that when Raven first asked her, immediately after the death of his wife, to take charge of the baby, Frances, and she asked him why he did not ask his sisters to take charge of her, he replied that he did not want his sisters to know he had been married. For some reason he evidently desired to conceal from his family the fact of this marriage, and this may account for the mis-statements as to his parentage in the application for the marriage license.

It is contended that even though a ceremonial marriage was entered into by Levi A. Raven and Beatrice K. Riggs at Hammond, Indiana, on October 15, 1906, it was void for the reason that the pretended divorce secured by Bea-

trice K. Riggs was void because of the lack of jurisdiction of the court. The divorce suit was brought in the name of B. N. Riggs, complainant. The solicitor for the complainant made affidavit that the defendant in the divorce proceeding on due inquiry could not be found so that process could be served upon him, and further that the place of residence of the said defendant was unknown and upon diligent inquiry could not be ascertained. Upon this affidavit substituted service by publication was had. It is now claimed that this service was ineffective and failed to give the court jurisdiction of the defendant, John W. Riggs, for the reason that at the time of the pendency of the divorce proceedings, and also before and after that time, Riggs was in the employ of Levi A. Raven, and this fact was known to his wife, Beatrice K. Riggs, and should have been known to her solicitor; that during the time of the pendency of this proceeding, and before and after that time, Beatrice K. Riggs not only knew that her husband was in the employ of Raven, but was receiving at least a part of his wages for her support, the same being paid directly to her by Raven. This claim is not borne out by the record. Kate McDonald was the only witness who testified to any facts upon which such a claim could be based. It is impossible to determine from her testimony the exact time Riggs entered the employ of Raven or when that employment ceased, and it is also impossible to determine during what period Mrs. Riggs received from Raven a part of the wages earned by her husband.

It is further claimed that the service by publication was ineffective for the reason that complainant was described, both in the bill of complaint and in the publication notice, as B. N. Riggs whereas her name was Beatrice K. Riggs. The appellants rely upon the statute authorizing service by publication upon a defendant whose place of residence is unknown, which requires the published notice to such defendant to state "the names of the parties," and contend

that the name "Bridget K." or "Beatrice K." was as much a part of the name of the complainant as "Riggs," and that the description of her as B. N. Riggs does not comply with the statute. The case of *Illinois Central Railroad Co. v. Hasenwinkle*, 232 Ill. 224, is decisive of this question. In that case notice of a condemnation proceeding was given to one "J. H. Burtis," who was described as a non-resident and the owner of the land condemned. It was held that this was equivalent to a notice to "J. Burtis," and bound the owner, whose name was "Joseph F. Burtis." In passing upon this question we there said: "The common law recognizes but one christian name, and a middle initial may be dropped or resumed or changed at pleasure. Its presence or absence or difference affects nothing. (*Gross v. Village of Grossdale*, 177 Ill. 248; *Clafin v. City of Chicago*, 178 id. 549.) While a letter of the alphabet does not constitute a name, yet the initial letter of the christian name is so commonly used that it is to be regarded, not as the name of some other person, but as an abbreviation of the christian name of the person intended.—*Lee v. Mendel*, 40 Ill. 359." In that case it will be observed that the question arose over the name of a defendant to whom notice was being given. In this case it is not denied that the defendant in the divorce proceeding was properly described by name. While it must be conceded that the better practice would be to give the full christian name of the parties to a suit, under the holding in the case above cited the use of the initial "B." was sufficient, and as the middle name or initial was no part of the name of the complainant it should be disregarded. The court had jurisdiction of the parties in the divorce proceeding, and that decree was valid.

The judgment of the circuit court is affirmed.

*Judgment affirmed.*



WILLIAM H. MOORE *et al.* Appellees, *vs.* SUSAN ANN  
ROWLETT *et al.* Appellants.

*Opinion filed June 24, 1915—Rehearing denied October 7, 1915.*

1. **WILLS**—*what instrument will not revoke former will.* Under section 17 of the Statute of Wills a former will can be revoked only by a subsequent duly executed will declaring a revocation of all former wills, and not by a subsequent instrument in writing not testamentary in character declaring such revocation. (*Stetson v. Stetson*, 200 Ill. 601, followed.)

2. **SAME**—*destruction of subsequent will revives former will.* As a will is ambulatory, inoperative, ineffectual and without legal existence until the death of the testator, the destruction of a subsequent duly executed will containing a revocatory clause expressly revoking all former wills will revive such former will.

3. **SAME**—*common law rule as to revocation of will is in force in this State.* The common law rule by which a former will is revived and restored by the destruction of a later one, wholly independent of the intention of the testator in destroying such later instrument, is in force in this State.

4. **SAME**—*revocation clause is ambulatory with the rest of the will.* A will is executed as a whole and is not to be operative until the death of the testator, and the revocation clause, like every other declaration of the testator's will and intent therein, is ambulatory, and must stand or fall with the other provisions of the instrument.

5. **SAME**—*will not revoked by a subsequent will which is defectively executed.* If an instrument intended as a will and containing a clause revoking a former will is so defectively executed that it is not entitled to probate, the instrument is not a will within the meaning of section 17 of the Statute of Wills and the former will is not revoked.

APPEAL from the Circuit Court of Cook county; the  
Hon. THOMAS G. WINDES, Judge, presiding.

ROBERT E. PENDARVIS, and ROBERT N. HOLT, for ap-  
pellants.

EASTMAN & WHITE, and C. VANALEN SMITH, for  
appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Appellees filed their bill in the circuit court of Cook county against appellants to contest the validity of an instrument admitted to probate in the probate court of that county as the last will and testament of Levi Moore, deceased. The grounds for the contest alleged in the bill were that the testator was not of sound and disposing mind and memory and that the will was the result of undue influence exercised over him by appellants. By a subsequent amended bill the further charge was made that by a later instrument in writing, executed by the testator as his last will and testament in the presence of two witnesses, he revoked the will in question. Appellants answered, admitting the death of Moore, the making of the will and codicil in question, their admission to probate and the appointment of John J. Lovett as executor, but denied the testator was of unsound mind and memory, that any undue influence was exercised over him by appellants or that the will and codicil in question were revoked by the later instrument. The answer further alleged that appellees were estopped from now raising this question by reason of their having had notice of the application to probate the will and codicil in question and their participation in such proceedings without raising the question now raised, and that a court of chancery had no jurisdiction of the question involved. The cause was tried before the court without a jury on a stipulation of facts, by which all questions of fraud, undue influence and incapacity to make a will were eliminated. It was agreed that the testator executed an instrument on March 20, 1900, as his last will and testament, (the will in question,) and on August 21, 1902, added thereto a codicil, and later, on December 12, 1903, executed another instrument in writing, in the presence of two witnesses, as his last will and testament, containing a clause expressly revoking all prior wills; that this later instrument was admitted to probate as his last will and testament, and that the order admitting

it to probate was subsequently vacated for want of statutory notice to all the heirs; that upon the second application probate was denied by reason of its defective execution, one of the witnesses not being a credible witness; that upon appeal to this court the order so denying probate was affirmed in *Rowlett v. Moore*, 252 Ill. 436; that thereupon the will of March 20, 1900, and codicil of August 21, 1902, were admitted to probate as the last will and testament of Levi Moore, deceased, and Lovett was appointed executor thereof, the parties saving to themselves all questions as to the competency, relevancy and admissibility of such evidence. At the conclusion of the hearing the court held the instrument of December 12, 1903, admissible and competent evidence as a revocatory instrument, and held that it worked a revocation of the former will of March 20, 1900, and codicil thereto, and entered a decree setting aside the order admitting the will of March 20, 1900, to probate as the last will and testament of the deceased. From this decree appellants have prosecuted their appeal to this court.

The principal question involved, and the only one we deem it necessary to consider, is the sufficiency of the later instrument to operate as a revocation of the former will and codicil. Appellants contend that under our statute a will can be revoked only by a later will duly executed and admitted to probate in the manner provided by law, while appellees contend that a former will may be revoked by any instrument in writing declaring such intention, executed in the presence of two witnesses, whether the same be in the form of another will defectively executed, or otherwise.

The manner in which a will may be revoked by the act of the testator is provided in section 17 of the Statute of Wills, (Hurd's Stat. 1913, p. 2491,) which is as follows: "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in

writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law." This section was before this court in *Stetson v. Stetson*, 200 Ill. 601, where it was held that a former will could only be revoked by a subsequent will declaring a revocation of all former wills, and not by a subsequent instrument in writing not testamentary in character declaring such revocation, and that as a will was ambulatory, inoperative, ineffectual and without legal existence until the death of the testator, the destruction of a subsequent duly executed will containing a revocatory clause expressly revoking all former wills would revive such former will.

Appellees attempt to distinguish this case from the *Stetson case* because in that case the later will was not found and no explanation was made of its loss from which it might be presumed that it was destroyed by the testator with the intention of reviving his former will, while in this case both instruments were preserved by the testator until his death, thus negating any presumption of intention to revive the former will by the destruction of the later will. The decision, however, in the *Stetson case* was not based upon any presumption as to the intention of the testator, but, on the contrary, it was there expressly held that the common law rule was in force in this State, by which a former will is revived and restored by the destruction of the later one, wholly independent of the intention of the testator in destroying such later instrument, although a different rule prevailed in the ecclesiastical courts, which followed the civil law, under which it was held that the question of revivor by a destruction of a later will is a matter of intention, to be determined from a consideration of all of the facts and circumstances attending the destruction of the later instrument. The decision in the *Stetson case* was

not based upon the question of the testator's intention, but, on the contrary, was based solely upon the positive rules of the common law and the language of section 17 of our Statute of Wills.

In the *Stetson* case it was admitted that the second will contained a clause revoking all former wills, and the court stated the propositions presented to it for decision as follows: "If the second will made by Jesse Stetson contained an express clause of revocation, did such clause operate at once and of its own force to immediately revoke and annul the first will, made on December 3, 1897, and did the loss or destruction of the second will containing such clause of revocation, even though such loss or destruction was the act of the testator himself, operate to revive the former will dated December 3, 1897?" In disposing of the two propositions presented for decision it was necessary for the court to first determine the effect of the execution of the later will with the clause revoking all former wills before proceeding to a determination of the effect of the destruction of such instrument on the former will executed by the testator, for if the mere execution of the subsequent instrument *ipso facto* worked a revocation and cancellation of all former wills, its destruction could not have been effective to revive such former will, as the act of revocation would have been completed and consummated when the instrument was executed and would have operated instantaneously to absolutely revoke such former will. (*In re Noon*, 115 Wis. 299; *Bates v. Hacking*, 28 R. I. 523; 14 L. R. A. [N. S.] 934; *Blackett v. Zeigler*, 153 Iowa, 344; 37 L. R. A. [N. S.] 291.) And in determining the effect of the execution of such subsequent will under our statute the court said, on page 612: "It being established, then, that under section 17 of the Illinois Statute of Wills a former will can only be revoked by a subsequent will declaring the revocation of all former wills, and not by a subsequent instrument in writing not testamentary in character which declares the

revocation of the former will, it cannot be said that in this State the destruction of a duly executed will containing an express revocation of a former will does not have the effect of reviving the former will." The rule announced in the *Stetson case* has been followed in several, if not all, of the jurisdictions where the common law rule is in force. *Bates v. Hacking, supra*.

In 40 Cyc. 1177, the author says: "If the instrument propounded as a revocation be in form a will, it must be perfect as such and be subscribed and attested as is required by the statute. An instrument intended to be a will, but failing of its effect as such on account of some imperfection in its structure or for want of due execution, cannot be set up for the purpose of revoking a former will." The reason for this is that the instrument is executed as a whole and is not to be operative until the death of the testator, and the revocation clause, like every other declaration of the testator's will and intent therein, is ambulatory, and must stand or fall with the other provisions of the instrument. (*Loughton v. Atkins*, 1 Pick. 535; *Eccleston v. Petty*, Carth. 78.) In *Bates v. Hacking, supra*, the court said: "The statutory provisions for revocation by will properly executed or by some writing declaring an intention to revoke, executed like a will, are neither identical nor interchangeable. They differ materially, in that the former relates to a will while the latter does not. One looks toward the future while the other regards the present. The writing declaratory of an intention to revoke is evidence of a present intention, and when executed becomes, of itself, a complete revocation, but the revocation by will takes effect only when the will of which it forms a part becomes effective, and that can never be in the lifetime of the testator."

In this State the legislature has provided several ways by which a former will may be revoked by the act of the testator, and in such provision has provided that when the revocation is attempted by another instrument it must be

"by some other will, testament or codicil in writing, declaring the same," etc. This language is clear, plain and unambiguous, and in the *Stetson case*, *supra*, was held to mean what it plainly says. A further reconsideration of the matter leads us but to re-affirm what we there said.

For the reasons given, the decree of the circuit court will be reversed and the cause remanded, with directions to dismiss the bill.

*Reversed and remanded, with directions.*

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FREDERICK H. CASE vs. THE EMERSON-BRANTINGHAM COMPANY, Appellee.—(GEORGE A. DONNELLY, Appellant.)

*Opinion filed June 24, 1915—Rehearing denied October 7, 1915.*

1. ATTORNEYS' LIENS—*effect of Attorney's Lien law.* The Attorney's Lien law gives an attorney who has given the notice required by the act a lien for his contract fees if he has a contract for such fees, or reasonable fees otherwise, on the amount recovered by suit or paid in settlement, and does not alter the relation of attorney and client.

2. SAME—*what determines the amount of the lien where the person liable settles with claimant in full after notice.* Where a corporation, after being notified of the claimant's attorney's contract for one-half of "whatever amount is received as damages out of said claim," as attorney's fees, settles with the claimant and pays him the full amount of the settlement without withholding the share of the attorney, the attorney may collect from the corporation one-half of the amount recovered by his client and not a sum equal to the whole amount paid him. (*Sutton v. Chicago Railways Co.* 258 Ill. 551, distinguished.)

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PETIT, Judge, presiding.

RANKIN, HOWARD & DONNELLY, for appellant.

RALPH F. POTTER, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Frederick H. Case, by appellant as his attorney, brought suit in the circuit court of Cook county against the appellee for damages for personal injuries. Prior to bringing the suit Case and appellant had entered into a contract in writing by which appellant was to be paid for his services as attorney in the suit "a sum of money equal to one-half of whatever amount is received as damages out of said claim or cause of action." Appellant served notice on appellee of the terms of his contract with Case, claiming a lien by virtue of the Attorney's Lien law of 1909. (Laws of 1909, p. 97.) Thereafter appellee settled the suit with Case, without the knowledge or consent of appellant, for the sum of \$160 and paid Case the entire amount. Appellee also notified appellant of the settlement and tendered appellant the sum of \$80, which amount appellee conceded the appellant was entitled to under his contract with Case, which sum appellant refused and subsequently filed his petition to enforce his lien under the contract with Case, claiming \$160. Appellee answered the petition and again tendered the sum of \$80. A trial was had and judgment entered for \$160 in favor of appellant, from which appellee prosecuted its appeal to the Appellate Court for the First District, which court reversed the judgment of the circuit court and entered judgment in favor of the petitioner in the court below, appellant here, for \$80 and assessed the costs against him. The Appellate Court granted a certificate of importance, and appellant has appealed to this court from the judgment of the Appellate Court, assigning as error the action of the Appellate Court in reversing the judgment of the circuit court.

The portion of the statute under which appellant claims is as follows: "That attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon



which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action."

This enactment was first before this court in the case of *Standidge v. Chicago Railways Co.* 254 Ill. 524, in which case we held the law was constitutional, and that where an attorney had a contract with his client for one-third of the amount such client would recover in a suit for personal injuries, and the defendant to the suit settled the suit for \$900 out of court and without the knowledge or consent of the attorney, the attorney was entitled to recover from the defendant \$300. In the case of *Sutton v. Chicago Railways Co.* 258 Ill. 551, there was a contract between an attorney and client by which the attorney was to receive one-half of what would be recovered in a suit brought against the Chicago Railways Company by one Speicher. The company settled with Speicher for \$365, and in addition, and as a part of the settlement, agreed to pay Speicher's attorney, Sutton, a reasonable fee, whether on account of the written contract with him or otherwise earned by him. In that case we held that the Chicago Railways Company, by reason of having obligated itself, as a part of its agreement of settlement, to pay the attorney's fee in addition to the amount paid to the attorney's client, was bound to pay the attorney a sum equal to that paid to the client.

The only effect of the Attorney's Lien law is to give an attorney who has given the notice required by the act a lien for his contract fees, if he has a contract for such fees or reasonable fees otherwise, on the amount recovered by suit or paid in settlement. It does not alter the relation of attorney or client. Primarily, the client who hires the attorney is liable for the services of such attorney. It was expressly held in the *Sutton case*, *supra*, that the Attor-

ney's Lien act does not affect the right of a defendant in a suit, or of persons against whom claims or demands are held by attorneys for collection, from settling the same, but it requires that they shall, after notice, in making such settlement, retain sufficient funds from the amount of the settlement to satisfy the lien of the attorney for his fees. This being true and Case having the right to settle with appellee, and having settled in good faith so far as shown by the record, upon the settlement being made he owed appellant, as his attorney, by reason of the contract, one-half the amount which he received, or \$80. He was liable for that amount, and that is all appellant could have recovered from Case. If appellant had been paid that amount by Case then the contract would have been fully performed, or if he had sued Case and recovered such amount then the contract would have been enforced and appellant would have no reason to invoke the aid of the Attorney's Lien law. As the law in question merely gives the attorney a lien upon the claim, etc., the amount for which appellant could claim a lien would be no greater than the amount which he would be entitled to recover from his client, (*Whitcotton v. St. Louis and Hannibal Railway Co.* 250 Mo. 624,) and the only question in this case is the amount which he is entitled to recover. It is also true that appellee, after making the contract of settlement with Case for \$160, had the right, and it was its duty after being duly served with notice of appellant's contract, to withhold from said settlement one-half the proceeds thereof, or \$80, and pay the same to appellant, in which case appellant would have no further right of action. The fact that appellee has paid to Case the entire amount is not controlling. It is simply compelled to pay one-half of the said amount over again because it did not withhold the portion due appellant under his contract after notice of such contract.

For the reasons given, the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

ARTHUR H. SODEN *vs.* JOHN CLANEY *et al.*—(THE CITIZENS BANK OF MUKWONAGO, Plaintiff in Error, *vs.* ARTHUR H. SODEN *et al.* Defendants in Error.)

*Opinion filed June 24, 1915—Rehearing denied October 8, 1915.*

1. PRACTICE—*denial of writ of certiorari is not an approval of Appellate Court's reasons for its judgment.* While the denial of a petition for a writ of *certiorari* by the Supreme Court makes the judgment of the Appellate Court final in the cases specified in section 121 of the Practice act, yet the effect of such denial is merely an approval of the conclusion reached by the Appellate Court, being, in effect, an affirmance of the judgment, and is not necessarily an approval of the reasons given in the opinion of the Appellate Court for its judgment.

2. SAME—*effect where two defendants file separate petitions for certiorari and only one is allowed—cross-error.* Where the two defendants to a bill prosecute separate appeals from the decree to the Appellate Court, and thereafter, upon the appeals being consolidated and the decree affirmed, file separate petitions for *certiorari* in the Supreme Court, where one petition is allowed and one denied, the party whose petition is denied is concluded by such action, and he cannot have the same matters reviewed again by the Supreme Court by assigning cross-errors on the record upon which the other *certiorari* petition was allowed.

3. ESTOPPEL—*when owner of equitable title is not estopped to deny claim of bank.* The mere fact that the equitable owner of land purposely conceals his ownership for reasons of his own and permits the legal title to remain in another does not raise an estoppel which will preclude his right to deny the claim of a bank to a lien on the premises for money loaned to a third person, where the bank was in no way misled or deceived by his action but loaned the money and extended the credit upon the personal representations of the borrower and without reference to the ownership of the premises.

WRIT OF ERROR to the Branch "B" Appellate Court for the First District—heard in that court on appeal from the Circuit Court of Cook county; the Hon. KICKHAM SCANLAN, Judge, presiding.

ELA, GROVER & MARCH, (FRANK R. GROVER, of counsel,) for plaintiff in error.

HELMER, MOULTON, WHITMAN & WHITMAN, and HOYNE, O'CONNOR & IRWIN, (FRANK A. HELMER, and LLOYD C. WHITMAN, of counsel,) for defendants in error.

Mr. JUSTICE COOKE delivered the opinion of the court:

Arthur H. Soden, claiming to be the owner of the leasehold, and a large apartment building situated thereon, at the northwest corner of Indiana avenue and Twenty-fourth street, in the city of Chicago, on August 1, 1907, filed his bill in the circuit court of Cook county praying that John ClaneY, the holder of the legal title to the premises, be decreed to convey to Soden such title, and for an accounting for rents and profits. Willis P. Dickinson and the Citizens Bank of Mukwonago, Wisconsin, were also made parties defendant. These defendants answered severally, and the bank filed a cross-bill, wherein it alleged that on July 31, 1903, ClaneY purchased the premises in question at foreclosure sale and received a master's certificate of sale therefor; that ClaneY became such purchaser at the solicitation of Dickinson, who was then acting as agent for Soden; that on November 1, 1904, ClaneY secured a master's deed to the premises and thenceforth was the record holder of the title; that through misrepresentations made to the bank that Dickinson was the equitable owner of an interest in the property and that he and ClaneY owned it jointly, Dickinson procured a loan from the bank and gave as security therefor his alleged interest in these premises, and that Soden, by his conduct in holding out ClaneY as the owner of the premises and in allowing Dickinson and ClaneY for a long time to exercise acts of ownership and to obtain credit of the bank, subordinated his rights and interests to the rights, interests and equitable

lien of the bank, to the end that the lien of the bank should be maintained and protected, and that Soden is in equity estopped from denying the interest of the bank. The cross-bill prayed that the lien of the bank be established, and that the defendants, or some of them, be decreed to pay the amount due, and that in default the premises be sold to satisfy the decree, or, in the alternative, that a lien be established in favor of the bank upon the interest of Dickinson in the premises.

By his answer Dickinson claimed to have had some interest in the premises but alleged that the same had been assigned to Clane. Clane answered, denying the material allegations of the bill, and alleging that he purchased the property at foreclosure sale pursuant to a contract entered into between Soden, W. P. Dickinson and John W. Dickinson, which provided for the purchase of this property and of the adjustment thereafter of the interests of the parties to the contract in the same; that by assignments duly made he succeeded to the rights of Willis P. Dickinson and John W. Dickinson in that contract, and that he held the title to the property pursuant to the terms of that contract, and has never failed to recognize the ultimate right of Soden to be protected by the property to the extent of his interest therein according to the provisions of the contract referred to.

Issues having been formed on the bill and cross-bill, the cause was referred to a master in chancery of the circuit court to take the proof and report the same, together with his findings thereon. The master reported that Soden was entitled to the relief prayed for in the original bill and that the Citizens Bank of Mukwonago had an equitable lien on the premises for the sum of \$11,929.09, with interest at the rate of five per cent from the 19th day of July, 1907. Exceptions to the master's report relative to his findings on the original bill were overruled. Exceptions to the report of the master relative to his findings as to the lien

of the bank were sustained, and a decree was entered according to the prayer of the original bill and dismissing the cross-bill of the bank. From this decree separate appeals were prosecuted by ClaneY and the bank to the Appellate Court for the First District. These causes were consolidated in the Appellate Court and the decree of the circuit court was affirmed. At the October term, 1914, of this court, ClaneY and the Citizens Bank of Mukwonago filed separate petitions for the statutory writ of *certiorari* to review the judgment of the Appellate Court. These petitions were considered upon their merits, and the petition of ClaneY was denied but the petition of the bank was allowed and the writ of *certiorari* ordered to issue. ClaneY thereafter asked for and was allowed leave to assign cross-errors, which challenged the correctness of the judgment of the Appellate Court so far as it affirmed the decree of the circuit court in granting the relief prayed for in the original bill.

Upon the issuance of the writ of *certiorari* on the petition of the bank this cause proceeded under our rules as if pending on writ of error, and under section 107 of the Practice act, ClaneY, as a defendant in error, had the right to assign cross-errors on the record. This right extended, however, only to such questions as were at issue and undetermined in the cause. By section 121 of the Practice act the judgments or decrees of the Appellate Court are made final in all cases except those wherein appeals and writs of error are specifically required by the constitution to be allowed from the Appellate Courts to the Supreme Court, or in cases where certificates of importance are allowed by the Appellate Court, or in cases which the Supreme Court may require to be certified to it by *certiorari* or otherwise. The denial by this court of a petition for *certiorari* in a case not required by the constitution to be reviewed by this court and where a certificate of importance has not been issued by the Appellate Court makes the

judgment of the Appellate Court in that case final. It does not follow that such a denial of a petition for the writ of *certiorari* is an approval of the reasons upon which the Appellate Court bases its judgment, but it is an approval of the conclusion reached, and is therefore, in effect, an affirmance of the judgment. Had Claneý not filed his petition for *certiorari* and had he relied upon the petition filed by the bank to secure a review of the Appellate Court judgment, he could then have assigned cross-errors upon this record challenging the judgment, as it affected him as a defendant in the original bill. Having elected to pursue a different and independent course by filing his own petition for the writ of *certiorari*, and having thus submitted his case as a defendant in the original bill to this court and secured a finding thereon, he is concluded by that action and cannot now be heard on any cross-errors which present the same matters for the consideration of the court. The effect of denying Claneý's petition for the writ of *certiorari* was to hold that there were no probable grounds for the reversal of the judgment of the Appellate Court so far as it affected the rights of Claneý as a defendant in the original bill. The cross-errors assigned by Claneý and the argument based thereon all go to that part of the judgment of the Appellate Court which affects the rights of Claneý as a defendant in the original bill. These matters having been finally disposed of on Claneý's petition for *certiorari*, they will not be further considered.

Some time prior to the year 1903 an apartment building, known as the Concord Apartment House, was built upon the leasehold in question by the Concord Apartment House Company, the cost of erection being paid partly from the proceeds of bonds which were secured by a trust deed upon the leasehold and the improvements. Soden was a purchaser of some of these bonds. There having been a default in the payment of interest, foreclosure proceedings were instituted in the circuit court of Cook county

which resulted in a decree for the sale of the premises. It appears from the testimony that prior to the date of the sale, which was fixed for July 31, 1903, Soden arranged with Willis P. Dickinson, with whom he had transacted some business theretofore, to purchase the property for him in the name of his son, Charles A. R. Soden. At the sale Dickinson purchased the property in the name of ClaneY instead of Soden's son, which act on his part was thereafter ratified by Soden. The master issued ClaneY a certificate of sale, which was immediately assigned to Charles A. R. Soden and transmitted to him on August 6, 1903. Thereafter this certificate of sale was re-assigned to ClaneY, and a master's deed was issued to him on November 1, 1904. At the time of and prior to the foreclosure proceedings there were various mechanics' liens and judgments which were liens upon this property. Some of these were superior to the trust deed being foreclosed and others were subject to it. One of these judgments was in favor of the Tobey Furniture Company, and the property had been sold at sheriff's sale to satisfy this judgment. ClaneY, with money furnished by Soden, procured an assignment of the sheriff's certificate of sale, and in February, 1904, had a sheriff's deed issued to him pursuant to this certificate. This deed was not placed upon record.

Willis P. Dickinson was engaged in the brokerage business in the city of Chicago, and about the year 1902 he began selling commercial paper to the Citizens Bank of Mukwonago. Practically all of this paper was indorsed and guaranteed by Dickinson, who represented himself to the bank to be a man of large means. Some of the paper so sold to the bank was the paper of ClaneY, or of John ClaneY & Co., of which ClaneY was the sole member. In the summer of 1904 the bank held paper thus indorsed by Dickinson, amounting to something over \$11,000, which it was unable to collect. Beginning in June of that year, and extending through the months of July and August, the



officers of the bank had frequent conferences with Dickinson at Mukwonago in reference to his liability to the bank. On June 30 Dickinson rendered a written statement to the bank of his assets and liabilities whereby he showed his net worth to be \$202,665. Among his assets he scheduled "interest in real estate northwest corner of Indiana and 24th Sts. (clear) \$100,000." He stated to the bank officials that he owned a half interest in this property, which he referred to as the "Concord" or "Concordia" apartments, and that the legal or record title was in John Clane, who owned the other half interest. On September 7, 1904, Dickinson gave his note to the bank for \$11,060, due in six months, with which to take up the paper the bank then held and upon which Dickinson was guarantor. As collateral to this new note Dickinson put up 950 shares of capital stock in the Pacific Tube Works, the notes which the bank had formerly held and for which this new note was given, and made a written assignment to the president of the bank of all his "right, title and interest in and to the property known and described as the Concord Apartment House Company, situated on the northwest corner of Indiana avenue and Twenty-fourth street, in the city of Chicago." This instrument described the notes and shares of stock also put up as collateral, and provided that when the said indebtedness of \$11,060 was fully paid this assignment of Dickinson's interest in these premises should be canceled and surrendered to him. Prior to this time the bank had made no investigation to ascertain whether Dickinson had any interest in the Concord Apartment House property or to verify any of his statements relative to his alleged interest. At the time the \$11,060 note was given and this assignment of his alleged interest in these premises was made to the bank, Dickinson referred the bank to Clane. The bank thereafter wrote a letter to Clane, who also resided in the city of Chicago, inquiring as to Dickinson's interest in this property. This letter is not in

evidence. To this inquiry Claneý replied on September 21, 1904, as follows:

CHICAGO, Sept. 21, 1904.

*"Perry Camp, Cashier, Mukwonago, Wis.*

"DEAR SIR—Replying to your inquiry regarding real estate in which W. P. Dickinson claims interest, I beg to say that in August, 1903, I bought the property in question at master's sale and paid something like \$50,000 for the same on Mr. Dickinson's order and am still the record holder of the same. The property is well located, and the building I think originally cost for construction, in 1896, about \$300,000, and certainly could not be built for less than original cost. Rentals are about \$2500 per month, gross. Building is in good repair, etc.; insurance \$150,000. I do not know what Mr. Dickinson's interest is, but have always understood it was large.

"Yours truly,

JOHN CLANEY."

At this time Claneý held the unrecorded sheriff's deed issued pursuant to the sale under the Tobey Furniture Company's judgment and the master's certificate of sale under the foreclosure proceedings. After receiving this communication from Claneý the bank caused the records to be investigated, and learned that Claneý was the purchaser at the foreclosure sale and was entitled to a deed upon the expiration of the period of redemption.

Dickinson failed to pay the \$11,060 note at its maturity. On April 19, 1905, he took up this note and delivered in its stead five notes, due in one, two, three, four and five months, respectively, and aggregating \$13,508, presumably receiving the difference between the amount of this note and the amount due on the note of September 7, 1904, in cash. These notes were not paid when due, but on March 10, 1906, they were taken up and two demand notes, aggregating \$13,500, given in their stead. On November 9, 1906, two new notes were given by Dickinson to the bank, due in four and six months, respectively, aggregating in amount \$11,450, which were in lieu of the notes of March 10, 1906. To secure the payment of the notes given April 19, March 10 and November 9, the assignment of September 7, 1904, was in each instance put up as collat-

eral. Some time during the early summer of 1905,—but whether before or after the making of the notes of April 19, 1905, does not appear,—Dickinson delivered to the bank a copy of a contract dated June 30, 1903, which is the contract alleged to have been entered into between Soden and the two Dickinsons prior to the foreclosure sale. This contract recited that whereas this property was to be sold at foreclosure sale, it should be purchased by the parties thereto and the title taken by Soden or anyone whom he should select, for the joint interests of the three parties to the contract. It was then provided that Soden should furnish the necessary money for the purchase of the property, provided that the Concord Apartment House Company should make and deliver a deed to Soden for the premises prior to the foreclosure sale; that after the purchase of the property by Soden at the sale, 400 five per cent first mortgage gold bonds, each of the par value of \$500, should be issued, and from this issue of bonds Soden should receive at par a sufficient number, in amount, to pay him in full for his advancements; that John W. Dickinson should receive twenty of the bonds, and the remainder should be divided, thirty per cent to Soden and thirty-five per cent each to John W. Dickinson and Willis P. Dickinson. The interest of John W. Dickinson in this contract had been assigned to Willis P. Dickinson, and he in turn had assigned his interest to Clane. By its decree the circuit court found that Soden had never executed this instrument but that his signature attached to it was a forgery. This finding is fully warranted by the evidence, and we concur in it.

There is no dispute between the parties as to the law applicable to the case. The only question involved is whether the facts are such as to create an equitable estoppel against Soden to assert his rights as against the claim of the bank. It is undisputed that Soden concealed his interest in this property, and that he purposely and for

reasons of his own invested Clanev with the legal title and all the indicia of ownership. The record title stood in Clanev, and after November 1, 1904, Clanev was in possession and with W. P. Dickinson assumed the full management of the property. So far as the bank or anyone else was concerned, Soden held Clanev out as the owner of the property, and if, as a result of that, the bank was led to rely and act upon the apparent ownership of Clanev and was thereby caused to change its position to its harm and detriment, Soden is estopped to deny the right of the bank to enforce its equitable lien. The bank, however, did not extend credit to Clanev upon the strength of his apparent ownership of this property. While Clanev had some dealings with the bank through Dickinson, it does not appear that any credit was extended him because of his alleged interest in this property, and so far as this record discloses, Clanev has paid the bank every cent he ever owed it. While Dickinson acted as the agent and representative in Chicago of Soden, who was a resident of Massachusetts, the bank had no knowledge of this fact, and it appears that it never heard of the existence of Soden until Dickinson delivered to it the copy of the contract of July 30, 1903, during the summer of 1905. In taking the commercial paper negotiated by Dickinson during the years 1902 and 1903 the bank relied solely upon the representations of Dickinson as to his personal financial standing and responsibility. When the officials of the bank began pressing him in June, 1903, they had become skeptical of Dickinson's responsibility, as one of the officials of the bank puts it, and after he had made a written statement of his assets and liabilities they were not satisfied and insisted that he must give some real estate security for his indebtedness. The bank had reached the point in its dealings with Dickinson where it was demanding either an immediate payment of his indebtedness or ample real estate security. During these negotiations Dickinson informed

the bank that he owned a half interest in the premises in question clear of all incumbrance and worth \$100,000. He stated that John Clane held the record title and owned the other half interest. An investigation would have disclosed that Clane at that time held a master's certificate of sale and that there were various outstanding mechanics' liens and judgments, the holder of any one of which was entitled to redeem from the master's sale. The bank made no investigation whatever but relied solely upon the assurances and word of Dickinson and took an assignment of his alleged interest as collateral to the new note for \$11,060. Two weeks thereafter it received a letter from Clane, in reply to an inquiry made, which failed to substantiate the statement made by Dickinson. By that letter Clane stated that he bought the property at master's sale on Dickinson's order and was still the record holder of the same. From this statement no other inference could be drawn than that Clane had no actual interest in the property but was holding the record title for some undisclosed person. In conclusion he states that he does not know what Dickinson's interest is, although he has always understood it was large. Dickinson's statement to the officials of the bank was, that while the record title was in Clane he owned an undivided one-half of the premises and Clane owned the other half. It would seem remarkable that any prudent business man, after receiving such a statement, should be satisfied with the response the bank received from Clane. If Clane was a tenant in common with Dickinson in this property, owning the undivided one-half, he seemed to be unaware of the fact. He states unequivocally that he does not know what Dickinson's interest is. He does not assert that he himself has any further interest in the property than as the holder of the record title. His statement that he has always understood that Dickinson's interest was large is not sufficient. It is not such a statement by the holder of a legal title as will estop

the equitable owner. The only investigation ever made by the bank thereafter was to determine whether the legal title was still in Claney. Although Dickinson furnished the bank, in the summer of 1905, with a copy of the agreement of June 30, 1903, which it was claimed Soden had executed, and although this was the first time that any official of the bank had ever heard that Soden was interested in the property, no inquiry was made of him as to his interest or the interest of Dickinson. The notes of March 10, 1906, and November 9, 1906, were given to the bank after it had been furnished with the copy of this alleged agreement, and although, under the terms of this agreement, Dickinson did not have the interest in the property which he reported to the bank, the officials of the bank testified that the forbearances of March 10 and November 9, 1906, were made upon the assurances that Dickinson still owned an undivided one-half interest in this property and in consideration of the assignment of such interest as collateral security.

It does not appear from the record whether at any time during the period of his negotiations with the bank Dickinson was solvent. The only evidence bearing upon this is the fact that during the years 1902 and 1903 there were a number of unsatisfied judgments of record against him in the various courts of record of Cook county. That question, however, as we view the matter, is not important. Under the facts as disclosed it cannot be said the Citizens Bank of Mukwonago was in any way deceived or misled by the act of Soden in allowing Claney to hold the legal title to these premises. The bank, without any assurances on the part of Claney sufficient to bind him or his principal, Soden, relied upon the word of Dickinson that he owned an interest in this property. Soden is in nowise bound or estopped by any representation made by Dickinson to the bank.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

JOHN Y. CHISHOLM, Trustee in Bankruptcy, etc., Defendant in Error, *vs.* THE FIRST NATIONAL BANK OF LEROY, Plaintiff in Error.

*Opinion filed June 24, 1915—Rehearing denied October 8, 1915.*

1. **BANKRUPTCY**—*statement of the "net results" rule as to preferences.* Where there is a running account between the parties and the effect of payments made is to keep the account alive, with the result that new credits are extended and new goods placed in stock which make a net gain to the bankrupt estate, the payments made on the open account for goods sold and delivered within the four months' period mentioned in section 68 of the Bankruptcy act, without knowledge on the part of the creditor of the debtor's insolvency, are not void as a preference, the net results of the transaction being to increase and not deplete the creditor's estate.

2. **SAME**—*charging off overdraft to general checking account is not a preference.* Where money is deposited by a debtor in his general deposit and checking account at the bank in the regular course of business, the charging off by the bank against such deposit of an overdraft on his account is not a preferential payment prohibited by section 68 of the Bankruptcy act, even though the depositor, after continuing his deposits and checking against his account for a few days, goes into bankruptcy.

3. **SAME**—*when satisfaction of note to bank is a preferential payment.* Where a debtor, a few days before going into bankruptcy, sells certain property and receives in payment therefor a check made payable to the bank where he keeps his account, the action of the bank in satisfying a note held by it against the debtor without depositing the money in the debtor's account and receiving a check from him in payment of the note must be regarded as a preferential payment within the prohibition of section 68 of the Bankruptcy act.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

LESLIE J. OWEN, and DEMANGE, GILLESPIE & DEMANGE, for plaintiff in error.

LIVINGSTON & BACH, and WELTY, STERLING & WHITMORE, for defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Defendant in error, John Y. Chisholm, trustee in bankruptcy of the Clark Grain and Elevator Company of LeRoy, Illinois, brought his action in assumpsit in the circuit court of McLean county against plaintiff in error, the First National Bank of LeRoy, to recover certain alleged preferential payments of money made to it contrary to the provisions of the national Bankruptcy law. A trial was had before a jury, resulting in a verdict and judgment in favor of the defendant in error for \$8815. On appeal to the Appellate Court for the Third District this judgment was reversed and the cause remanded for another trial. (*Chisholm v. Bank of LeRoy*, 176 Ill. App. 383.) A second trial was then had and resulted in a verdict and judgment in favor of defendant in error for \$10,718, which judgment, on appeal to the Appellate Court, was affirmed. A writ of *certiorari* was allowed and the cause is now in this court pursuant to such writ.

The Clark Grain and Elevator Company (hereinafter called the grain company) was a corporation organized under the laws of this State. Plaintiff in error is a national bank, organized under the national Banking law, and is engaged in the general banking business at LeRoy. At and prior to the time of this transaction its combined capital stock and surplus amounted to \$60,000. Under the provisions of the national Banking law it was not allowed to make loans to any one customer to exceed ten per cent of its combined capital stock and surplus. (5 Fed. Stat. sec. 5200.) Prior to November 1, 1910, the grain company was engaged in the business of buying and selling grain at Argenta, Illinois. On that date it disposed of its elevator there and purchased one at LeRoy for \$12,500. It paid \$6000 in cash on the purchase price and gave a mort-



gage on the elevator for the balance. At the same time it also leased another elevator at LeRoy and one at Empire, Illinois. On November 4, 1910, it began to operate these elevators and at that time opened an account with plaintiff in error, known as the LeRoy account, to which account it deposited \$1000. On November 25 it negotiated a loan of \$1000 from the plaintiff in error and opened a second account with it, known as the Empire account. These accounts were general checking and deposit accounts and were overdrawn much of the time in 1911. The LeRoy account was continuously overdrawn from January 17 to February 9. On February 14 the overdraft was \$5746.68 and on March 18, \$4027.51, and it varied between February 14 and March 20 from \$3500 to \$6769.87. The Empire account was continuously overdrawn from February 23 to March 20, 1911, at which time the overdraft in this account, amounting to \$1438.59, was transferred to the LeRoy account. On February 1, 1911, the grain company borrowed \$5000 from plaintiff in error on its demand note. On March 20 it disposed of its elevator at LeRoy and a crib of corn it had on hand to one Crumbaugh, from whom it had purchased the elevator, and received in payment two checks,—one for \$6360, the other for \$2337, or \$8697. The checks were made payable to the order of plaintiff in error. With this money the \$5000 note and accumulated interest, amounting to \$40, were paid and the note surrendered, and the balance of \$3657.50 was deposited in the bank to the credit of the grain company's account. This transaction was consummated at about the opening of banking hours on the morning of March 20, 1911. Later in the day plaintiff in error received two drafts, amounting to \$980, with way-bills attached, for two cars of corn, which were also deposited to the general credit of the grain company's LeRoy account, making the total deposits to its credit for the day \$4637.50. Its overdraft at the opening of business on March 20 was \$4027.50, so that had no

checks been drawn on that account during the day it would have had a balance to its credit of \$610 at the close of business on March 20, 1911. During the day, however, checks were drawn on this account and paid, including one for the Empire overdraft, aggregating \$1643.59, leaving an overdraft on the grain company's account of \$1033.59 at the close of business for the day. On March 21 the further sum of \$1895 was deposited to this account, which would have left a credit of \$867.41 to its account had no further checks been drawn against it that day and paid. During this day, however, checks to the amount of \$1159.79 were drawn against the account and paid, leaving an overdraft at the close of business for the day of \$298.38. March 22 another check for \$1.86 was drawn on this account and paid, thus increasing the overdraft to \$300.25. At some time during the day of March 21 other checks were presented for payment, which the cashier requested the payee to hold for a day or two or until such time as more money was deposited to the credit of the grain company's account. Upon learning of this action on the part of the cashier the officers of the grain company opened an account with the Keenan bank of that city, where deposits were made aggregating \$4665.26 at the close of business on March 22, at which time it ceased doing business. On May 15, following, the grain company was declared an involuntary bankrupt. This action was brought to recover the proceeds of the sale of the elevator and crib of corn, amounting to \$9677.50, as a preferential payment, which, with interest to the time of trial, amounted to \$10,718,—the amount of the verdict and judgment subsequently rendered.

The evidence shows that at the time the grain company began business with plaintiff in error its assets consisted of an equity of \$6000 in the elevator and \$1385 in cash, and that shortly thereafter it expended \$1171 in making improvements on the elevator. At this time it owed Thayer & Co. \$5000 on a note, with interest from July, 1910, and

had corn bought under contracts for future delivery at Argenta on which it sustained a loss of between \$2000 and \$3000 by reason of a decline in the market. The exact time when the losses first occurred by reason of the drop in the market price of corn is not clearly shown by the evidence. It further appears that on November 28, 1910, H. C. Clark, president of the grain company, borrowed \$1063.97 on his life insurance policies, which sum he deposited to the credit of the grain company's account. On November 30, 1910, the grain company borrowed the further sum of \$2500 from one Boyd, a grain commission merchant of Indianapolis, which also was deposited to its credit with the plaintiff in error. On December 28, 1910, Clark used \$3025 of this fund in paying a debt of the H. C. Clark Grain Company of Oklahoma,—a different company from the Clark Grain and Elevator Company and for which debt the latter company was in no way responsible. The money so paid was a total loss to the grain company, as the company for which it was paid was financially irresponsible. On February 13, 1911, the leased elevator in LeRoy, with its contents, of the value of about \$6000, burned and was almost a total loss to the grain company, as it had but \$500 insurance on the contents of the elevator. As a result of these losses the grain company ultimately disposed of its property and ceased doing business on March 22, 1911.

Plaintiff in error insists the grain company was insolvent at the time it commenced business in LeRoy, which fact was unknown to plaintiff in error until after March 20, and that the net result of the transactions between it and the grain company was to increase the assets of the latter company more than \$1000, and that therefore, under the "net result rule," the payments made to it are not voidable as preferences. *Jaquith v. Alden*, 189 U. S. 78, (47 L. ed. 717,) and *Wild & Co. v. Provident Life and Trust Co.* 214 U. S. 292, (57 L. ed. 1003,) and other cases, are cited

in support of this contention. In each of the above cases cited there was a running account between the parties, and the effect of the payments made was to keep the account alive, with the result that new credits were extended and new goods placed in the stock which resulted in a net gain to the bankrupt estate, and it was there held that payments made on an open account, in the regular course of business, for goods sold and delivered within the four months' period, without knowledge on the part of the creditor of the debtor's insolvency, were not voidable as a preference where the net result of such transactions was to increase, and not deplete, the creditor's estate. Under these holdings it would seem the plaintiff in error had a right to have such questions submitted to the jury under proper instructions, but no proper instruction on that question was offered by it. The instruction tendered was as follows:

"If you believe, from the evidence, that the Clark Grain and Elevator Company was insolvent at the time it began business dealings with the defendant and that it continued to be insolvent during all of its dealings with the defendant, and that the net result of such dealings was to increase the assets of said Clark Grain and Elevator Company and also to increase its indebtedness to the defendant, then, under the law, there was no preference and your verdict should be for the defendant."

This instruction omitted, among other elements, the elements of open account, knowledge of insolvency and payments made in the regular course of business, and was properly refused.

It is next insisted plaintiff in error had a right to apply the money received from Crumbaugh and on the bills of lading to the grain company's indebtedness to it under the provisions of section 68 of the Bankruptcy act, which permits mutual accounts between the parties to be set off one against the other. In considering this question it will be necessary to distinguish between the money applied on

the note and the money deposited to the grain company's general checking and deposit account in the bank, for the reason that the two transactions are governed by different principles of law.

Section 68 of the Bankruptcy act provides as follows:

"(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other and the balance, only, shall be allowed or paid.

(b) A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate, or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy."

This section was construed in *New York County Nat. Bank v. Massey*, 192 U. S. 142, (48 L. ed. 380,) where it was held that money deposited in a general checking and deposit account could be set off by the bank against debts due it from the bankrupt. It was there said: "It can not be doubted that, except under special circumstances or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes a part of the general funds of the bank, to be dealt with by it as other moneys, to be lent to customers and parted with at the will of the bank, and the right of the depositor is to have this debt re-paid, in whole or in part, by honoring checks drawn against the deposits. It creates an ordinary debt—not a privilege or right of a fiduciary character. (*National Bank v. Millard*, 10 Wall. 152; 19 L. ed. 897.)

\* \* \* It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same

situation and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences, so as to prevent set-off in cases coming within the terms of section 68a. If, this argument were to prevail, it would, in cases of insolvency, defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full." To the same effect are *Continental and Commercial Trust and Savings Bank v. Chicago Title and Trust Co.* 229 U. S. 435; 57 L. ed. 1268; *Studley v. Boylston Nat. Bank*, 229 U. S. 523; *Tomlinson v. Bank of Lexington*, 76 C. C. A. 400; 145 Fed. Rep. 824; *Toof v. City Nat. Bank of Paducah*, 124 C. C. A. 118; 206 Fed. Rep. 250. As stated in *Remington on Bankruptcy*, (vol. 11, 2d ed. sec. 1180): "A deposit in bank is not a preference, even when applied upon a debt with full knowledge of the debtor's insolvency, where it has been made as a general deposit subject to check and creating the relation of debtor and creditor, and not made as a deposit to pay a particular debt, and therefore, not being a preference, it is available as an offset to the debtor's note or other debt." *Booth v. Prete*, 81 Conn. 636; 20 L. R. A. (N. S.) 863, and cases cited.

In the *Continental and Commercial Trust and Savings Bank case*, *supra*, it was held that a balance on deposit subject to check for a specific purpose might be applied by the bank to the payment of the depositor's indebtedness to it without violating the prohibitions of the Bankruptcy act against preferential transfers, although the transaction took place within four months of the bankruptcy proceedings, and the bank at the time had reasonable cause to believe the depositor was insolvent. In *Studley v. Boylston Nat. Bank*, *supra*, it was held the enforcement by a bank of its lien or

right of set-off by applying deposits, honestly made in due course of business and without intent to prefer the bank, to the payment of the depositor's notes in the bank's favor as they matured, did not constitute a preference forbidden by the act although within four months of the bankruptcy proceedings, there being nothing in section 68a of that act which prevents the parties from voluntarily doing before the petition in bankruptcy is filed what the section itself requires to be done after the proceedings in bankruptcy are instituted. And in *Tomlinson v. Bank of Lexington, supra*, on the authority of *New York County Nat. Bank v. Massey, supra*, it was held that the charging off by the bank of an overdraft to the debtor's deposit account, made in the usual course of business, did not amount to a preference which would require the bank to surrender the deposit as a condition to filing its claim against the bankrupt's estate for a balance due it.

The facts in this case which are shown by the evidence bring the plaintiff in error clearly within the law as it has been announced and applied in the above cited cases. Here the money was deposited to the general account of the grain company in the usual course of business of the parties. It was treated in no different way from any other deposit theretofore made by the grain company to its account while it transacted business with plaintiff in error. It is in no way distinguishable from the other deposit made on the following day. Defendant in error does not seek to recover any portion of this last deposit, but, on the contrary, concedes that it was made in the usual course of business and is not recoverable as a preference. We are unable to see any difference in the two deposits. Both were made in the usual course of business of the parties and placed to the general credit of the grain company, subject to its check. Both were treated precisely alike by them in their dealings, and we find nothing in the record which would warrant us in holding the one recoverable as

a preference and the other not. The source from which the money was received did not and could not alter the general character of the deposit when once it was placed to the general credit of the grain company's account with plaintiff in error. The proceeds of the payment made by Crumbaugh to the grain company, over and above what was applied on the note, and the proceeds of the two bills of lading, were deposited to the account of the grain company and remained subject to its check, and checks were drawn against it and paid from it even after the credit established by the deposits had been fully exhausted. That the deposits in question were made in the usual course of business is conclusively established by the evidence, which shows that the grain company exercised the right to check against the account, and drew checks against it on March 20, 21 and 22, which were duly honored by plaintiff in error. Had the grain company continued to make deposits to its account and deposited the \$4665.26 with plaintiff in error that it deposited with the Keenan Bank, for all that this record shows there would have been a balance to its credit with plaintiff in error at the time it suspended business, March 22, 1911. The fact that the officers of the plaintiff in error were insisting that the grain company pay its overdraft cannot have the effect of making the deposits made by the grain company to its general account, in the usual course of business, void as a preference, when they were neither made nor received in payment of a pre-existing debt or with the intention of closing its account. It was the duty of the bank officers, under the law, to insist that the overdraft be reduced. The indebtedness of the grain company to the bank was greater than the amount allowed by law to any one borrower. The act of the grain company in transferring its business to another bank did not alter the relation of debtor and creditor or deprive plaintiff in error of its right of set-off after it had once accrued. The right of set-off was established by the course of deal-



ings between the parties, and under the rule laid down in *New York County Nat. Bank v. Massey*, *supra*, and cases cited above, the money deposited to the general account of the grain company with plaintiff in error was properly applied in satisfaction of any mutual debt owing by that company to the plaintiff in error. The overdraft in question was a debt of that character.

The cases of *Hotchkiss v. National City Bank*, 200 Fed. Rep. 287, and *Ernst v. Mechanics and Metals Nat. Bank*, 201 id. 664, relied upon by the defendant in error, do not oppose this view. Both of these cases were subsequently passed upon by the Supreme Court of the United States. In the *Hotchkiss* case suit was brought to recover securities transferred by an insolvent firm of brokers to a bank in payment of what is called a "clearance loan,"—that is, a loan of money to be used to purchase securities which are later to be deposited as security for such loan. The money must be loaned and the securities bought and paid for before they can be deposited as such security. In that case the transfer of the securities was made after the brokers had suspended business on the stock exchange because of insolvency and with knowledge of that fact by the bank officers and also with knowledge that a petition in bankruptcy was about to be filed. No question of bank deposits made in the usual course of business was involved. In fact, deposits amounting to several hundred thousand dollars were made by the insolvent firm with the bank the same day on which the loan was made and the firm became insolvent, and it seems from the opinion that such deposits were applied without question on the indebtedness of the firm and no question raised that such deposits were a preference. Some of the securities transferred bore no relation to the clearance loan and were not purchased with the money furnished by the bank on such loan, and the broker transacted no further business with the bank after the securities were transferred. On these facts it was held in

*National City Bank v. Hotchkiss*, 231 U. S. 50, (58 L. ed. 115,) that the transfer of the securities was voidable as a preference, but that the securities,—not their value, where they had depreciated in value,—might be recovered by the trustees of the bankrupt. In the *Ernst* case the deposit was made after the cashier of the bank, because of the threatened insolvency of a firm of stock brokers, had forbidden payment of checks drawn against the deposit account and thereby closed the account. The deposit was not made in the regular course of business and was not subject to check after it was made. The broker suspended business a few minutes after making the deposit, and a few hours after it was made the petition in bankruptcy was filed. The court held that as the so-called deposit was paid in after the cashier had forbidden payment of checks against the deposit account the payment was voidable as a preference. *Mechanics and Metals Nat. Bank v. Ernst*, 231 U. S. 60; 58 L. ed. 121.

The above two cases illustrate the point in question and are clearly distinguishable from each other and from the case at bar on the facts, and manifestly can have no application to any question involved here, except the payment on the \$5000 note made the morning of March 20, 1911. As to this item a different situation is presented. The money with which it was paid never was deposited in the general account of the grain company and the situation of mutual accounts between the parties as debtor and creditor was never established as to it. On the contrary, the money was received and was applied directly in payment of the note with the intention of extinguishing the pre-existing debt evidenced by it. The payment on the note, therefore, is governed by the rule announced in *Pirie v. Chicago Title and Trust Co.* 182 U. S. 444, *Hotchkiss v. National City Bank*, *supra*, and *Mechanics and Metals Nat. Bank v. Ernst*, *supra*, and is voidable as a preference. However, had this portion of the fund also been deposited to the general credit

of the grain company's account, thus establishing the relation of debtor and creditor having mutual accounts, and had a check then been drawn in payment of the note, the transaction would be governed by the rule announced in *New York County Nat. Bank v. Massey*, *Studley v. Boylston Nat. Bank*, and *Booth v. Prete*, *supra*, and not voidable as a preference. *Toof v. City Nat. Bank of Paducah*, *supra*.

It is also urged that the court erred in the admission and rejection of evidence. The errors complained of are of such a character that they are not apt to occur again, and we deem it unnecessary to do more than state that we think the objection to the admission of the schedule of debtors and creditors, and what the attorney said about the conveyance of March 20 at the creditors' meeting held five days later, should have been sustained. Evidence of insolvency and the existence of other creditors of the same class was expressly admitted. Neither do we think the deposit slip showing the special character of the deposit made with the other bank as a trust fund for the benefit of the grain company's creditors should have been admitted. The character of that deposit was not an issue in the case, and its admission in evidence could only tend to confuse the jury as to the general character of the deposits made with plaintiff in error. The deposit slip with the other bank had no bearing on any issue in the case, and the objection thereto should have been sustained.

For the reasons given, the judgments of the Appellate and circuit courts will be reversed and the cause remanded to the circuit court for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

ANDREW O'DAY *et al.* Plaintiffs in Error, *vs.* CHRISTOPHER COLUMBUS CRABB *et al.* Defendants in Error.

*Opinion filed June 24, 1915—Rehearing denied October 7, 1915.*

1. **APPEALS AND ERRORS**—*when the Supreme Court will not consider weight of evidence.* Where a decree must be reversed and the cause remanded for a new trial for errors intervening during the course of the trial the Supreme Court will not express any opinion as to the weight of the evidence.

2. **WILLS**—*certified transcript of testimony of subscribing witnesses on probate is admissible in circuit court.* Under the Wills act, which provides that on a will contest in chancery the certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence, a certified transcript of the testimony of the subscribing witnesses on the hearing in the probate court is admissible, and the fact that one of the witnesses is dead at the time of the trial in the circuit court and the other is beyond the jurisdiction of the court is not material.

3. **SAME**—*what question as to undue influence is not proper.* The question asked of a subscribing witness in a proceeding to probate the will, whether any fraud, duress or undue influence was used or applied to cause the testatrix to subscribe her name to the instrument, and the answer of the witness that there was none whatever, are improper, and if specific objections had been made when the transcript of the testimony was read in the circuit court it would have been the duty of the court to sustain the objections.

4. **SAME**—*when proper to show financial condition of heirs of testator—rule as to beneficiary not an heir.* The financial condition of those having claims upon a testator's bounty may be taken into consideration in connection with the will itself in determining the question of testamentary capacity, provided such financial condition is shown to have been known to the testator; but the court may, in any event, exclude testimony as to the financial condition of a beneficiary who is not a relative of the testator.

5. **SAME**—*contestants cannot show that the testator previously had made a different will.* Complainants in a proceeding to contest a will cannot show that the testator had made a different will at a previous time, since a person has the right to change his mind in reference to the disposition of the property, and the mere fact that he does so has no bearing upon the question of his mental capacity.

6. SAME—*when the proponents' proof in rebuttal is properly admitted.* In a will contest case, where the evidence of the proponents in rebuttal is designed to meet that produced by the contestants, the fact that it has a bearing upon the mental capacity of the testatrix does not render it improper if it is not of such a nature as should have been anticipated by the proponents.

7. SAME—*when admission of coroner's verdict as to cause of death is harmless.* Where both parties to a proceeding to contest a will agree that the testatrix died of pneumonia but the contestants claim that the pneumonia was caused by administering a drug, the admission in evidence of the coroner's verdict that the testatrix died of pneumonia is harmless.

8. SAME—*question as to existence of a fiduciary relationship should be left to the jury.* An instruction which attempts to state the rule as to the burden of proof where one of the beneficiaries sustained a fiduciary relationship to the deceased, and which assumes the existence of such relationship without leaving that question for determination by the jury, is erroneous.

9. SAME—*instruction should not ignore undue influence where that is one of principal grounds of contest.* An instruction directing a verdict sustaining the will if the jury believe, from the evidence, that the testatrix, at the time the instrument was signed, had mind and memory sufficient to transact ordinary business affairs and knew and understood the business in which she was then engaged, is improper where the element of undue influence, which was one of the principal grounds of contest, is ignored.

10. SAME—*where execution of will is one of the grounds of contest it should not be assumed in instructions.* Where there is evidence tending to sustain the contestants' claim that the signature to the will is not genuine, the instructions for the proponents should not assume the execution of the instrument.

11. INSTRUCTIONS—*when party cannot complain of assumption in instructions.* That certain instructions given at the request of the proponents assume matter which should be left to the jury is not ground for complaint by the contestants, where many of the instructions given at their request contain the same assumption.

12. SAME—*instruction should contain all elements necessary to warrant verdict, where verdict is directed.* Where an instruction directs a verdict all the elements necessary to warrant such verdict must be contained in the instruction.

13. SAME—*jury should not be told that executor is entitled to employ expert witnesses.* Where a medical witness, testifying in support of a will, states that he expects to receive \$100 a day for his services as a witness, opposite counsel have a right to argue

that the fact that medical witnesses were receiving so much money for testifying affected their credibility, and it is error to give an instruction sanctioning the right of the executor to employ expert witnesses, and stating that no inference prejudicial to the executor should be drawn from the fact that he engages in the defense of the will.

WRIT OF ERROR to the Circuit Court of Cook county;  
the Hon. THOMAS G. WINDES, Judge, presiding.

SAMUEL C. HERREN, for plaintiffs in error.

CRUCE & LANGILLE, and ARTHUR E. MAYO, (DANIEL L. CRUCE, and WEST & ECKHART, of counsel,) for defendants in error.

Mr. JUSTICE COOKE delivered the opinion of the court:

Mary Spiegel died March 27, 1913, at the home of Christopher Columbus Crabb, one of the defendants in error, in the city of Chicago, leaving a paper purporting to be her last will and testament. This paper was admitted to probate in the probate court of Cook county. From that order an appeal was taken to the circuit court, where a like order admitting the will to probate was entered. Thereafter plaintiffs in error filed their bill in the circuit court of Cook county to set aside the probate of this will on the grounds that the deceased had never executed the instrument, that at the time the instrument purports to have been executed the deceased was mentally incompetent to make a will, and that at the time the will purports to have been executed the deceased was subject to the undue influence of Christopher Columbus Crabb, his wife, and other legatees named in the will. Upon the trial in the circuit court the jury returned a verdict finding that the paper in question was the last will and testament of Mary Spiegel, deceased. A decree was entered accordingly, and this writ of error has been sued out from this court to review that decree.

Mrs. Spiegel was a resident of the city of Chicago and at the time of her death resided about two blocks from the home of Crabb. She left an estate of approximately \$90,000. For a number of years prior to her death Crabb had advised her in a business way and had assisted her in making investments of her money. She was not related to him in any way, but it appears that she was a frequent visitor at his home and that he and his wife were on friendly terms with her and had shown her much attention. On March 20, 1913, Mrs. Spiegel, then in good health, visited the Crabb home, where she took dinner with Mr. and Mrs. Crabb and other guests on the evening of that day. After dinner she was taken ill. Pneumonia developed and she died on the morning of March 27. She left surviving her four brothers, (Andrew, Jeremiah, Cornelius and John O'Day,) and the sons and daughters of two deceased brothers, (Thomas and James O'Day,) and of one deceased sister, (Helen Cummings,) as her only heirs-at-law. The evidence discloses that she was on friendly terms with her relatives but was more friendly with some of them than with others. It is not shown, however, with which of her relatives she felt the least friendly. At the time Mrs. Spiegel was taken sick at the Crabb home Christopher Columbus Crabb was suffering from some ailment and his family physician was in attendance upon him. This physician was called to treat Mrs. Spiegel and attended her until her death. It does not appear that any of Mrs. Spiegel's relatives were notified of her condition until the evening of March 26,—the day before she died. On that evening one of her brothers was notified of his sister's illness and in company with his wife and daughter he went to the Crabb home. On arriving there they found Mrs. Spiegel unconscious and unable to speak to them. They were permitted to remain in the room but a few minutes. The daughter, realizing that her aunt was in a dying condition, asked permission to remain there over night, but this request was re-

fused. She thereupon suggested to her mother to ask to be allowed to stay, but Mrs. Crabb informed them that she intended to lock up the house for the night and they must go. This was the only occasion when any of the relatives of Mrs. Spiegel were permitted to see her during her illness, and, so far as the record discloses, this brother was the only one of the relatives notified of Mrs. Spiegel's condition prior to her death. On the afternoon of March 26 Mrs. Crabb sent for Arnold Tripp, an attorney, to come to the residence. He arrived about 3.45 o'clock and remained there about half an hour. A trained nurse arrived during the afternoon. There is some conflict in the testimony as to whether she arrived before Tripp came or after he had departed. The evidence on the part of the proponents shows that the nurse arrived prior to the departure of Tripp. While there, Tripp prepared the will in question, and it was witnessed by Tripp, Mrs. Anna Kraai, the nurse, and Bertram S. Purinton, a friend of Crabb, who had been summoned for that purpose by Mrs. Crabb. These witnesses all testify that the instrument was executed by Mrs. Spiegel in their presence. By this instrument the sum of \$2500 is bequeathed to each of the brothers Andrew, Cornelius and Jeremiah and the interest on \$2500 is bequeathed to the brother John, then an inmate of the Dunning asylum, for and during his natural life. These are the only bequests made to any of her relatives or heirs-at-law. To Mary Weaver was bequeathed the interest on the sum of \$2500 for and during her natural life; to Joseph Collosky, Sr., was bequeathed the sum of \$1000; to Elizabeth Crabb, the wife of Christopher Columbus Crabb, the sum of \$5000, and to George E. Felton \$5000 in South Side Railroad bonds. All the residue and remainder of her estate was devised and bequeathed to Christopher Columbus Crabb, who was also made executor without bond. Collosky was not related in any way to Mrs. Spiegel but was one of the intimate friends of Crabb and seems to have



been constantly at his home, where he frequently met Mrs. Spiegel. What connection Mary Weaver and George E. Felton had with the deceased, if any, does not appear.

It is insisted that the verdict of the jury and the decree of the court are so contrary to the clear preponderance of the evidence that the decree should be reversed for that reason, alone. The evidence on the part of the contestants and all the facts which have any bearing upon the issues tend to create considerable doubt as to the testamentary capacity of Mrs. Spiegel at the time the will purports to have been executed and as to whether she was free from undue influence on the part of certain of the beneficiaries named in the instrument at the time of its execution, but as the decree must be reversed and the cause remanded for a new trial for errors intervening during the course of the trial we will refrain from expressing any opinion as to the weight of the evidence.

The probate of the will was resisted in the probate and circuit courts. The testimony of the subscribing witnesses was taken in the probate court upon questions propounded to them by counsel for the respective parties, and a transcript of the testimony of Arnold Tripp and Mrs. Kraai was offered in the circuit court by proponents in making out their case in chief, and it is now insisted that the admission of this transcript was error. Tripp had died since the trial of the case in the probate court, and it was represented by counsel for proponents that Mrs. Kraai was without the jurisdiction of the court. These facts, however, did not affect the right of proponents to introduce the transcript of this testimony in evidence. Under the Wills act, which provides that on a will contest in chancery the certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence, a certified transcript of the testimony of the subscribing witnesses on the hearing in the probate court is admissible; and this is true notwithstanding the witnesses themselves may also have testi-

fied to the same effect on the trial on the contest of the will. *Baker v. Baker*, 202 Ill. 595; *Kellan v. Kellan*, 258 id. 256.

Upon his examination in the probate court Tripp was asked whether any fraud, duress or undue influence was used or applied to cause Mrs. Spiegel to subscribe her name to the instrument, to which he responded there was none whatever. Mrs. Kraai was asked virtually the same question but in a different form, the inquiry addressed to her being whether any such fraud, duress or undue influence was used or practiced to her knowledge. The question asked of Tripp, and his answer thereto, were improper, and had counsel objected to this specific question and answer when the transcript of the testimony was being read to the jury the court should have sustained the objection. (*Adams v. First M. E. Church*, 251 Ill. 268.) No specific objection was made, however, to this question, either upon the reading of the transcript of the testimony of Tripp or Mrs. Kraai.

Nellie Heffernan, a niece of Mrs. Spiegel, was called on behalf of contestants and was asked concerning the financial condition of Andrew O'Day and of her father, two of the brothers of Mrs. Spiegel, at the time of her death. Objections to these questions were sustained. While the deduction might fairly be drawn from the record that the court meant to hold that in no event would this proof be competent, from the state of the record we must hold there was no error in this ruling of the court. It was proper to show the financial condition of the heirs-at-law of Mrs. Spiegel provided the same was known to her, as the known financial condition of those having claims upon a testator's bounty may be taken into consideration in connection with the will itself in determining the question of testamentary capacity. (*Kern v. Meyer*, 264 Ill. 560.) The contestants did not show, or offer to show, that the financial condition of her brothers was known to Mrs. Spiegel. The essential part of such proof is to show that the testatrix had knowl-

edge of such financial condition, and in the absence of this proof the objections were properly sustained.

The action of the court in refusing to permit contestants to show the financial condition of Christopher Columbus Crabb is also complained of. There was no error in excluding this testimony. There is no analogy between disinheriting one who is in an impoverished condition and who has a claim upon the testator's bounty, and in favoring one who is not a relative and who may be a person of wealth and affluence.

Complaint is made of the action of the court in refusing to admit proof of a former will whereby Mrs. Spiegel had left the major portion of her estate to her relatives and heirs-at-law. This proof was properly excluded. It is proper to show the contents of a former will on behalf of the proponents in a case of this kind where such former will was drawn along the same general lines as the instrument contested, in order to show that the testator had a constant and enduring scheme for the distribution of his property, and thus refute the charge of lack of testamentary capacity or undue influence. There is no analogy between such a case and the one here presented, where it is attempted to show on the part of the contestants that the testatrix had made a different will at a different time. Mrs. Spiegel had the right at any time to change her mind in reference to the disposition of her property, and the mere fact that she did change her mind would have no bearing whatever upon the question of her mental capacity.

It is contended that the court erred in permitting proponents to make out their case in respect to mental capacity, in rebuttal. There is no foundation for this charge. The evidence of proponents in rebuttal was designed to meet that produced by contestants, and while it had a bearing on the mental capacity of the testatrix it was not of such a nature as should have been anticipated by proponents. It was proper rebuttal and the court did not err in admitting it.

It was contended on the trial that the pneumonia from which Mrs. Spiegel suffered was produced by a drug administered to her by Dr. Miller and Mrs. Purinton. This charge evidently was made soon after Mrs. Spiegel's death, as Crabb procured an inquest to be held over her body. The coroner's jury returned a verdict finding that Mrs. Spiegel died of pneumonia. Proponents offered the coroner's verdict in evidence, and it is claimed that its admission was error. The contestants, while claiming that the disease was produced by the administration of ether, agree with the proponents that Mrs. Spiegel died of pneumonia. The verdict of the coroner's jury, therefore, was in accord with the theory of both proponents and contestants as to the cause of death. It threw no light whatever upon the charge made by the contestants that pneumonia was produced by the administration of a drug. The admission of this evidence was harmless.

A large number of instructions was asked and many were given on behalf of both proponents and contestants, the number of the last instruction appearing in the abstract being 66. The action of the court in giving many of the instructions submitted by the proponents and in refusing to give many of those submitted by the contestants is complained of. It was entirely unnecessary to burden the court with the labor of examining the large number of instructions offered in this case. The issues were simple and well defined. Many of the instructions refused are long, involved and confusing, and we will not attempt to discuss them. It is contended that the court erred in refusing some of these instructions which attempted to state the rule as to the burden of proof where one of the beneficiaries sustained a fiduciary relationship to the deceased. If the jury believed, from the evidence, that Christopher Columbus Crabb sustained a confidential and fiduciary relationship to Mrs. Spiegel at the time of the execution of the will and that he was in some manner directly connected

with the making of the will, then, under the law, the burden rested upon him to show, by clear and convincing proof, that no undue influence was exercised by him upon Mrs. Spiegel to procure the execution of the instrument in question. (*In re will of Barry*, 219 Ill. 391; *Yess v. Yess*, 255 id. 414.) This was a proper matter upon which to instruct the jury. The refused instructions dealing with this phase of the case were erroneous in that they assumed that such a fiduciary relationship existed, without leaving that question for determination by the jury.

In rebuttal the proponents produced various medical expert witnesses who testified regarding the effect of pneumonia upon the mental condition of the patient and the presence or absence of delirium under certain conditions. One of these witnesses testified that he expected to receive the sum of \$100 per day for his services as a witness. Proponents' instruction No. 3 told the jury that it is the duty of an executor to defend a will when attacked, and that in such defense he is entitled to employ competent counsel, expert witnesses, etc., and to do the things necessary to lawfully defend the will, and no inference prejudicial to the executor should be drawn from the fact that he engages in the defense of the will. It was error to give this instruction. Neither an executor nor any other party to a suit is entitled, as a matter of right, to employ expert witnesses or witnesses of any other kind. The processes of the court are always available to a party to a suit, and he can compel the attendance of any person as a witness whom he desires to have testify. A medical witness is entitled to no more consideration than any other witness, and whether he can be compelled to testify in no instance depends upon whether he is being paid a fee in addition to the witness fee allowed by law. (*Dixon v. People*, 168 Ill. 179.) The contestants had the right to argue to the jury that the fact that the medical witnesses for proponents were receiving \$100 per day for their services affected their credibility.

This instruction deprived them of the benefit of that right, and, in effect, gave these witnesses a superior standing in court to which they were not entitled.

Instructions 11, 29 and 30 on behalf of proponents each directed a verdict, and each, in effect, told the jury that if they believed, from the evidence, that Mrs. Spiegel, at the time she signed the instrument, had mind and memory sufficient to transact ordinary business affairs and knew and understood the business in which she was then engaged, they should find the paper writing to be her will. These instructions entirely ignored the element of undue influence,—one of the principal grounds of contest,—and under the well known rule that where a verdict is directed all the elements necessary to warrant such verdict must be contained in the instruction, the giving of these instructions was error.

A number of instructions on the part of the proponents assumed the execution of the instrument. The evidence on the part of the contestants tended to show that the signature to the instrument was not the signature of Mrs. Spiegel. A number of the witnesses testified that the name appended to the instrument was spelled S-p-e-i-g-e-l, whereas the name of the deceased was properly spelled S-p-i-e-g-e-l, and she always spelled it thus. Mrs. Heffernan testified that the name "Mary Speigel" attached to the instrument was not in the handwriting of her aunt. Under this state of the record, and it being one of the contentions of the contestants that Mrs. Spiegel did not execute the instrument, it was not proper to assume that the instrument had been executed by her. The contestants are not entitled to complain of this action of the court, however, as many of the instructions given on their part contained the same assumption.

For the errors indicated the decree of the circuit court is reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

EMMA WADHAMS GREEN, Appellant, vs. THE OLD PEOPLE'S HOME OF CHICAGO *et al.* Appellees.

*Opinion filed June 24, 1915—Rehearing denied October 7, 1915.*

1. *WILLS—rules as to vesting of devises of land apply, generally, to gifts of personal property.* In Illinois the general principles applicable to the vesting of devises of real estate apply, generally, to gifts of personal property.

2. *SAME—residuary clause must be kept in mind in construing will.* The residuary clause of a will must be kept in mind in construing a will, as the intention of the testator as expressed in the whole will must govern.

3. *SAME—distinction between words of limitation and words of condition.* Words of limitation in a will mark the period which is to determine the estate, whereas words of condition denote the circumstances or contingency that may defeat the estate in the intermediate time.

4. *SAME—distinction between estate upon condition subsequent and upon conditional limitation.* An estate upon condition subsequent does not divest the donor of his reversionary interest reserved to the donor to re-invest in him or his heirs upon breach of the condition, but a gift or a devise upon a conditional limitation divests the donor of his reversionary interest at once and vests it in the third party in whom the estate is to vest upon the happening of the contingency that is to defeat or terminate the intermediate estate.

5. *SAME—difference, as to forfeiture, between estates upon a condition subsequent and upon conditional limitation.* In an estate upon condition subsequent a breach of the condition will not, alone, defeat the estate without a declaration of forfeiture by the donor or his heirs and a re-entry by them, whereas in an estate upon conditional limitation a breach of the condition of itself defeats the estate and *ipso facto* vests it in the third party, who, alone, can take advantage of the breach.

6. *SAME—when a gift to charity is upon condition subsequent.* Where a gift to a charitable institution is in trust for a specific purpose, without words of condition or limitation to denote the character or duration of the estate or the time when it shall terminate, but there is a subsequent clause providing for a forfeiture of the gift in case the institution fails to carry out the objects of its organization or to promote the object of the gift, the estate is upon conditional limitation.

7. SAME—*what provision of a will is intended to secure the application of funds to specific purposes of bequests.* Where a will contains numerous bequests in trust to charitable institutions, a subsequent clause making the bequests void if such institutions "shall at any time fail or cease to carry out effectively the purposes for which they were, respectively, organized, and to promote which the bequests to them, respectively, are by me herein made and given," is intended to insure the application of the funds to the several specific purposes for which they were made.

8. SAME—*general rule as to disposition of lapsed legacies.* As a general rule, where specific bequests are made by a will containing a residuary clause and one or more of the specific bequests fail and thereby lapse, the lapsed legacies are distributed as part of the residuary estate; but this rule cannot be applied where to do so would defeat the obvious intention of the testator as expressed in the whole will.

9. SAME—*when lapsed legacy will not pass under the residuary clause.* Where the only residuary legatee who can, without violating the rule against perpetuities, take forfeited specific bequests to charitable institutions is, itself, one of such institutions and its specific bequest is subject to the same condition as the others with reference to forfeiture, the specific legacies forfeited for breach of the condition attached to them will go to the heir-at-law of the testator as intestate property and will not pass under the residuary clause.

10. SAME—*when allegation that reasonable time has elapsed to carry out charitable bequest is unnecessary.* In a bill by an heir-at-law to declare a forfeiture of a bequest in trust to a charitable institution, an allegation that a reasonable time has elapsed for carrying out the purposes of the bequest is unnecessary, where the specific allegations of the bill show that more than twenty years have elapsed since the institution received the funds and that it has never applied them to the purpose for which given.

11. SAME—*when gifts to charitable institution are for specific purposes.* Where one clause in a will gives a certain fund to a charitable institution in trust for investment and re-investment, the annual income to be used in defraying the current expenses "for the home for old men to be erected as hereinafter provided," and a later clause gives the same institution a certain sum in trust for the erection of a building for a "home for old men of American birth," both bequests are in trust for the specific purposes mentioned and not for investment in the general funds of the institution.



APPEAL from the Branch "B" Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding.

COBURN & BENTLEY, for appellant.

CHARLES R. WEBSTER, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Appellant filed her bill in chancery in the circuit court of Cook county against appellees to declare a forfeiture of certain bequests made to the board of trustees of the Old People's Home of Chicago by the last will and testament of Seth Wadhams, deceased, and to have the proceeds of such bequests declared a trust fund in the hands of the trustees of said Old People's Home for her use and benefit and for an accounting of the same. The circuit court sustained a demurrer to the bill. Appellant elected to stand by her bill and the same was dismissed for want of equity. She then sued out a writ of error from the Appellate Court for the First District, which affirmed the decree of the circuit court. A certificate of importance and an appeal were granted by that court, and the case is now in this court pursuant to such certificate of importance and appeal.

The bill charges that appellant is the sole heir of Seth Wadhams, late of DuPage county, who departed this life, testate, on February 6, 1888; that his will was duly admitted to probate in the county court of that county, and that the value of his estate at the time of his death was approximately one million dollars. A copy of the will is attached to the bill, the material provisions of which are the following:

By the first clause the testator directed his executors to take possession of all his property, real and personal,

and pay his debts and funeral expenses and the specific legacies. By the second clause he empowered his executors to sell and convey any real estate and dispose of any personal property in settling his estate. The third clause is as follows:

*"Third*—I order and direct my executors to sell, as soon after my death as they may deem expedient, my homestead, known as White Birch, and described as blocks three (3), four (4), nine (9) and ten (10) in D. N. Burnham's addition to Cottage Hill, in said PuPage county, and the proceeds to be distributed as follows, to-wit: One-half part thereof to the managers of the Chicago Nursery and Half-Orphan Asylum, to have and to hold to them and their successors in office, in trust, however, to and for the following uses and purposes, namely, in trust, to hold, manage, invest and control the same and the same from time to time to re-invest, and the annual income thereof to use and expend in defraying the current expenses of said asylum; and the remaining one-half part of said proceeds to the board of trustees of the Old People's Home of Chicago, Illinois, to have and to hold the same to them and their successors in office, in trust, to manage, invest and control the same and the same from time to time to re-invest, and the annual income thereof to use and expend in defraying the current expenses of the home for old men to be erected as hereinafter provided. Further, I hereby direct that my said homestead, known as White Birch, shall be sold to Mrs. Aurelia R. King, of Chicago, Illinois, for the sum of \$20,000, if she desires to purchase the same. In case the said Mrs. Aurelia R. King shall decline to purchase said homestead, then the same may be sold to any child or children of the said Mrs. Aurelia R. King for the said sum of \$20,000."

By clauses 4 to 31, inclusive, the testator made specific bequests to Frederick E. Hammond, (known as Frederick E. Wadhams,) and to various charitable institutions and

individuals, after which follow the thirty-second, thirty-third and thirty-fourth clauses, which read as follows:

*"Thirty-second*—I give and bequeath to the board of trustees of the Old People's Home of Chicago, Illinois, the sum of \$20,000, to have and to hold the same to them and their successors in office, in trust, however, to use and expend the same in the erection of a suitable building, the same to be used, managed and controlled by the board of trustees as a home for old men of American birth, only, separate and apart from said Old People's Home. The construction and design of said building to be under the charge and supervision of said board of trustees, and to be erected upon a lot adjacent to said Old People's Home or any other lot now or to be owned by said trustees.

*"Thirty-third*—All the rest, residue and remainder of my estate I give, devise and bequeath as follows, to-wit: One-half to the Chicago Relief and Aid Society of Chicago, Illinois, a corporation duly established by law, to have and to hold to said corporation and its assigns forever, but in trust, however, to hold, manage, invest and control the same and the same from time to time re-invest, and the income thereof to use and expend for the objects and purposes for which said society was established; and the remaining one-half to Frederick Eugene Hammond, (now known as Frederick E. Wadhams,) absolutely and forever.

*"Thirty-fourth*—In case any of the institutions or corporations which under and by virtue of this my last will shall receive any portion of my estate shall at any time fail or cease to carry out effectively the objects and purposes for which they were, respectively, organized, and to promote which the bequests to them, respectively, are by me herein made and given, then it is my will, and I do hereby declare, that the bequests made in this will to any such institution or corporation shall be held inoperative and void and for that cause be and become canceled, revoked and

annulled, and the same shall be held and disposed of as a lapsed legacy."

The bill charges that the executors received one-half of the proceeds from the sale of the White Birch homestead, or \$10,000, and on or about June 24, 1890, delivered to the then acting trustees of the Old People's Home such sum in trust, for the charitable uses and purposes expressed in the will; that the executors also received, on or about June 23, 1890, the further sum of \$20,000, which they turned over to the trustees of the Old People's Home under and by virtue of the thirty-second paragraph of the will; that the Old People's Home of Chicago is a corporation organized under the laws of the State of Illinois, not for pecuniary profit but for the charitable purpose of providing a home for old people; that the trustees thereof, and their successors, have never used the said bequests, or either of them, to carry out effectively the objects and purposes for which the bequests were made, but, on the contrary, immediately placed said funds with some financial institution, trust company or bank, and caused them to be invested and re-invested in various securities during the twenty-two years last past; that they have never built out of the fund of \$20,000 so bequeathed the home for old men of American birth, separate and apart from the Old People's Home, as provided in the will, nor have they used the proceeds of the said \$10,000 for the charitable use expressed in the will but still retain the same, so that the funds in the hands of the bank or financial institution, exclusive of fees paid to said trust company or financial institution, on May 18, 1911, amounted to the sum of \$71,900; that the Old People's Home and the trustees thereof have secured from various sources, for the charitable purpose of providing a home for indigent old people, a large fund, exceeding one million dollars, and have used the same exclusively to construct an extensive building for indigent old ladies, but have built no building or buildings or pro-

vided any support for old men of American birth either in such buildings already built or separate and apart from the Old People's Home buildings established by them for old ladies, nor have they provided any support for old men of American birth, as provided in the will, nor have they used the bequests or legacies therein given them in accordance with the intent of the testator, whereby appellant, as his heir, has the right to declare, and has declared, the gifts terminated, lapsed and canceled.

The bill further charges that the bequests have, by lapse of time and the failure to use the money for the purpose provided and by reason of the statute against perpetuities, lapsed and become a trust fund in the hands of the Old People's Home and its trustees for appellant, as the sole heir of said Seth Wadhams, deceased; that in 1870 she married and left home, and since that time has lived a great portion of the time in other States and knew but little of the details of the said will; that for many years she was in affluent circumstances but has since become impoverished, and until recently, or about April 15, 1911, did not know that the Old People's Home, and the trustees thereof, had failed and refused to carry out the terms of the will, and that old men of American birth had not, during the last twenty-two years, received any benefit from the said funds, until she, being in dependent circumstances and with no one upon whom she could depend for a livelihood, becoming old and in poor health and incapacitated from performing labor, applied for admission to and assistance from the said Old People's Home and was refused assistance, except a small stipend, unless she would release her claim, as the heir of her father, to the said fund, which caused her, she not being well versed in such matters, to fully investigate and discover her just rights in the premises; that on February 21, 1912, she caused notice to be served upon the Old People's Home and its officers and trustees, to the effect that she was the sole heir of said

Seth Wadhams, deceased, and did thereby declare the bequests made by her father, the said Seth Wadhams, in his last will and testament, to have lapsed and to have become null and void under and by virtue of the terms of his will, and that she demanded of the said Old People's Home, and its officers and trustees, that they account to her for the said bequests, together with the interest earned thereon, which they fail and refuse to do and deny that the bequest has lapsed, etc. The bill makes the Old People's Home of Chicago and its trustees parties defendant, and prays that the funds so received by them may be decreed a trust fund in their hands for the use and benefit of appellant and that the same be paid over to her, or that the securities in which such funds are invested, properly indorsed, be turned over to her, and that she may have such other and further relief in the premises as equity may require, etc.

The various questions raised and elaborately discussed by counsel for the respective parties may conveniently be considered and treated under the following heads: (1) The nature of the right or estate created by the third and thirty-second clauses of the will; (2) the disposition of such bequests in the event they are forfeited for failure to comply with the provisions of the third, thirty-second and thirty-fourth clauses of the will; and (3) the sufficiency of the allegations of the bill to show cause for forfeiture under the provisions of the thirty-fourth clause. A consideration of these questions will dispose of substantially all of the contentions made by the respective parties.

Appellant claims that by a proper construction of the will the bequests in the third and thirty-second clauses are gifts upon condition subsequent, subject to forfeiture under the thirty-fourth clause for failure to devote them to the uses and purposes for which they were made, and that upon such forfeiture being declared they revert to appellant, as sole heir-at-law of the testator, for the reason that

they could not vest in the residuary legatees without violating the rule against perpetuities. Appellees insist the bequests are gifts upon condition with a limitation over in favor of the residuary legatees, and hence estates upon conditional limitation; that the entire interest in such funds passed out of the testator by his will and no right or possibility of reverter remained in him or descended to his heirs; that as one of the residuary legatees, the Chicago Relief and Aid Society, is a charity, such gifts over do not violate the rule against perpetuities as to it although they may be void as to Frederick E. Wadhams under such rule, and that in the event of a forfeiture the Chicago Relief and Aid Society, as such residuary legatee, takes the whole amount of the estate so given to the Old People's Home.

The rule in this State is that the general principles applicable to the vesting of real estate apply, generally, to gifts of personal property, (*Hobbie v. Ogden*, 178 Ill. 357; *Carper v. Crowl*, 149 id. 465; *North v. Graham*, 235 id. 178;) and the fact that the gifts in question are of personal property instead of real estate will therefore make no difference in our consideration of this question. In nearly all the adjudicated cases treating of this subject the grant by deed or devise or bequest by will has been in direct terms, so worded that the construction of the terms of the grant, devise or bequest was necessary. In the case at bar the bequests under consideration, while they were undoubtedly bequests on condition by reason of the thirty-fourth clause of the will, can in no event be considered bequests with a limitation over without the aid of clause 33,—the residuary clause. The main purpose of the residuary clause in the will in question was, as in all wills, to dispose of the residuary estate, and it is necessary to keep this in mind, as the intent of the testator as expressed in the language of the will must govern.

In speaking of the two kinds of estates here in controversy, Chancellor Kent says: "Estates upon condition are such as have a qualification annexed to them, by which they may, upon the happening of a particular event, be created or enlarged or destroyed;" (4 Kent's Com.—14th ed.—122;) that they may be either precedent or subsequent; that "subsequent conditions are those which operate upon estates already created and vested and render them liable to be defeated;" (Ibid. 126;) and that "if the condition subsequent be followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it, that is termed a conditional limitation." (Ibid. 127.) The words of limitation mark the period which is to determine the estate, and the words of condition denote the circumstances or contingency that is liable to defeat the estate in the intermediate time.

The distinction between an estate upon condition subsequent and upon conditional limitation is this: An estate upon condition subsequent does not divest the donor of his reversionary interest, which by the terms of the gift or devise is reserved to the donor to re-invest in him or his heirs upon breach of the condition, while a gift or devise upon conditional limitation divests the donor of his reversionary interest at once and vests it in the third party in whom it is to vest upon the happening of the contingency that is to defeat and terminate the intermediate estate. Another important distinction is, that a breach of condition, alone, will not defeat the former estate without a declaration of forfeiture by the donor or his heirs and a re-entry by them, while in the latter case a breach of condition, alone, will defeat the estate and *ipso facto* vest it in the third party. In the one case nobody but the donor or his heirs can take advantage of the breach and a third party cannot; in the other, no one but the third party can take advantage of the breach and the donor or his heirs



cannot. (4 Kent's Com. 127; *Battle Square Church v. Grant*, 3 Gray, 142; *Mott v. Danville Seminary*, 129 Ill. 403; *North v. Graham*, *supra*.) Tested by these rules, it is at once clear that the estate created is upon condition subsequent and not a conditional limitation. The bequests in the third and thirty-second clauses of the will are not to the Old People's Home so long as it uses them for the certain purposes therein specified and then to another or some other person or corporation, but, on the contrary, the bequests are made without either words of condition or of limitation to denote the character or duration of the estate or the time when it shall terminate. If it were not for the provision for a forfeiture in the thirty-fourth clause the estate could not be defeated or terminated, no matter how flagrant the violation of the terms of the bequest, but the remedy would be by bill in equity to compel an observance of the terms of the trust. (5 Am. & Eng. Ency. of Law,—2d ed.—915; *Mills v. Davison*, 54 N. J. Eq. 659; 35 Atl. Rep. 1072; *Strong v. Doty*, 32 Wis. 381.) The provisions of the thirty-fourth clause, therefore, are words of condition and not of limitation, as they mark and denote the acts, or omission to act, which shall operate to revoke, annul and defeat the estate granted. *Battle Square Church v. Grant*, *supra*, does not oppose this view. In that case there was a gift over to a designated nephew and his heirs in case of failure to comply with the condition of the gift, which was a different bequest from those under consideration in this case.

As to the next contention, appellant insists that as the gifts are upon condition subsequent the title never passed out of the donor and his heirs, and upon a forfeiture being declared the title is re-invested in appellant, as the sole heir of Seth Wadhams, deceased. Appellees insist that by reason of the direction that the same shall be disposed of as a lapsed legacy, upon a forfeiture being declared such lapsed legacy falls into the residuary estate and goes to the

residuary legatees, who, alone, can declare and enforce a forfeiture. A consideration of these contentions involves the question as to the ultimate disposition to be made of the legacies in the event of forfeiture.

The thirty-fourth clause provides that in case any of the institutions or corporations receiving any portion of the testator's estate "shall at any time fail or cease to carry out effectively the objects and purposes for which they were, respectively, organized, and to promote which the bequests to them, respectively, are by me herein made and given," such bequests shall be held inoperative and void and become canceled, revoked and annulled and disposed of as a lapsed legacy. The purpose of this provision is apparent. Its object is to insure the application of the funds to the several specific purposes for which the bequests were made. This the testator sought to accomplish by providing that either a failure to devote the funds to the purpose for which they were severally given or a cessation of the purpose for which the corporations were organized should operate as a forfeiture of such bequests, and by the same clause he undertook to provide for the manner of the distribution of such funds in case of a forfeiture. For this reason the cases cited by appellant on the question of re-investiture of the title in the donor or his heirs in case of forfeiture are not in point. In those cases the conditions were expressed in deeds of conveyance, and consequently no disposition was made of the reversionary interest, which necessarily must have remained in the grantor or his heirs, while in this case, in the same clause in which the testator provides for a forfeiture, he also undertakes to make a disposition of the reversionary interest remaining in him, by providing that it shall be disposed of as a lapsed legacy. They therefore throw but little light on the main question in this case, which is, what did the testator mean and intend by such provision in the thirty-fourth clause of his will?

The situation, then, may be briefly summarized as follows: The testator made specific bequests that would be forfeited in the event of the happening of two contingencies: (1) If the beneficiaries ceased doing business or failed to effectively carry out the purposes for which they were organized; or (2) if they should fail to carry out the objects and purposes to promote which the bequests were made, then such bequests were to be void and disposed of as lapsed legacies.

A lapsed legacy goes either to the heir-at-law as intestate property or to the residuary legatee. The rule in this State is, that where specific bequests are made and there is also a residuary clause disposing of all the rest, residue and remainder of the estate, and for any reason any one or more of the specific bequests fails or is rendered void and thereby lapses, such lapsed legacy falls into and is disposed of as a part of the residuary estate. (*Crerar v. Williams*, 145 Ill. 625; *Dorsey v. Dodson*, 203 id. 32.) But this rule, like all others, as held in the above cases, is based upon the presumed intention of the testator, and should never be applied when to do so will defeat the obvious intent of the testator as expressed in the will. It is founded upon the presumption that the intention of the testator in taking the property away from the residuary legatee was only for the purpose of the particular legatee, and that upon the failure of such purpose he intended the residuary legatee should have it. (40 Cyc. 1944.) But this presumption will not prevail where the testator has by apt words or clear implication excluded such lapsed or ineffective legacy from the operation of the residuary clause. In such case the lapsed or void legacy goes to the heir-at-law of the testator as intestate property. (40 Cyc. 1948.) It is the cardinal rule in construing wills that the intention of the testator will control. To this rule all others are subordinate. (*Morrison v. Tyler*, 266 Ill. 308; *Howe v. Hodge*, 152 id. 252.) And this intention is to be ascer-

tained from a consideration of the whole will and all its parts. (*Black v. Jones*, 264 Ill. 548; *Morrison v. Tyler*, *supra*.) Guided by these cardinal rules and principles and looking at the will as a whole and considering all its parts, we are satisfied that it was not the intention of the testator, by the direction that such forfeited bequests should be disposed of as lapsed legacies, to thereby invest the residuary legatees with the reversionary title to such bequests in case of forfeiture. To do so would render the will in some of its most essential provisions inoperative and void. Under the will the two residuary legatees, the Chicago Relief and Aid Society and Frederick E. Wadhams, are each to share equally in the residuary estate. The gift over,—conceding it to be a gift over,—in so far as Frederick E. Wadhams is concerned, is void under the law concerning perpetuities, as it may not vest within the life of a person in being at the time of the death of the testator and twenty-one years and nine months thereafter. (*Johnson v. Preston*, 226 Ill. 447.) The gift can only be sustained as to the other residuary legatee upon the ground that it is a gift to a charity.

By virtue of the provisions of clause 33 the Chicago Relief and Aid Society is one of the beneficiaries under the will as residuary legatee. It is described as a corporation, and the bequest made to it is made for a specific purpose, "in trust, however, to hold, manage, invest and control the same \* \* \* and the income thereof to use and expend for the objects and purposes for which said society is established." Clause 34, which provides for the forfeiture of any and all bequests upon the conditions named therein, follows clause 33,—the residuary clause. While the relative positions of the different clauses in a will are not always controlling, the fact that here the clause declaring a forfeiture follows the residuary clause seems to emphasize and make clear the intent of the testator that the bequest to the Chicago Relief and Aid So-

ciety, as well as the bequests to the Old People's Home and the other charitable institutions mentioned in various clauses of the will, is subject to forfeiture under clause 34 of the will, but to hold that upon such forfeiture being declared it would re-take the same as such residuary legatee would render the whole of clause 34 inoperative and void as to this institution or corporation. We find nothing in the will to indicate it was the intention of the testator to exempt the Chicago Relief and Aid Society from the operation of the provisions of clause 34 of the will, nor do we think it was the intention of the testator that the same should be held ineffectual and void as to it. The controlling intention of the testator, as disclosed from a consideration of that clause in connection with the other clauses of the will, was to make the bequests to all the charitable institutions mentioned in the will, including the residuary legatee, the Chicago Relief and Aid Society, subject to forfeiture for a failure to devote such bequests to the objects and purposes for which they were made or given. Such being the intention of the testator, it is our duty to give effect to that intention when to do so will not violate some rule of positive law or property or settled principle of public policy. (*Black v. Jones, supra; Morrison v. Tyler, supra.*) And where, as in this case, the bequest vests and then lapses by reason of a subsequent forfeiture, and the residuary legatee is also a donee of gifts charged with a condition, we think the correct rule is, as stated in 40 Cyc. 1726, that a "forfeiture takes place only as to the gift to which the condition is attached, and its benefits go to the heirs, and not to the residuary legatees, where the residuary legatees are also donees charged with a condition." Such is substantially the situation presented here. Applying this rule to the facts and circumstances of this case and the intention of the testator as ascertained from a consideration of the whole will, we think that it was not the intent of the testator that such

legacies as lapsed by reason of forfeiture should become a part of the residuary estate, but that, upon a forfeiture being declared, under clause 34 of the will such lapsed legacies go to the heir-at-law of the testator as intestate property and not to the residuary legatees, and that appellant, as sole heir of the testator, has a right to maintain this bill to declare a forfeiture.

It is next insisted that the bill is defective because it does not allege that a reasonable time has elapsed in which to carry out the purposes for which the bequests in question were made, and because it further affirmatively appears from the bill that the Old People's Home of Chicago is devoting the funds received by it to the purposes for which it was organized, in providing a home for indigent old ladies. With these contentions we do not agree. The bill shows, by specific allegations, that more than twenty-one years have elapsed since the Old People's home received the funds bequeathed to it and that no part of the same has ever been devoted to the purposes for which the bequests were made, but, on the contrary, that the funds so given have been invested and re-invested for the purpose of accumulating a fund, but for what purpose the same is to be accumulated and used is not shown by the bill. What is a reasonable time is a question of law and fact, to be determined from a consideration of all the facts and circumstances of each particular case, and where the time that has elapsed is given, the allegation of the pleader that such time was a reasonable time would add nothing to the other facts well pleaded. Facts—not the conclusion of the pleader—should be pleaded. It was the plain duty of the trustees of the Old People's Home to devote the funds received by reason of these bequests to the purposes for which they were given. If the trustees could wait twenty years to build a home for old men of American birth they could wait a hundred years. It may well be that if the fund were allowed to accumulate indefinitely

through investments it would in the future take care of more old men, but the fact cannot be overlooked that in the regular order of things many old men who were eligible to benefit from the gifts in question if appellees had used such gifts as directed by the testator have passed from the need of homes on this earth. We think the bill was sufficient in this respect.

As to the last contention, while it is true that the bill alleges that the Old People's Home is devoting its funds to the promotion of the purposes for which it was organized, to the extent that it is providing a home for indigent old ladies, it further appears from the bill that this fund has not been invested in the construction of a building for a home for old men of American birth, only, and providing a fund for maintaining the same, as provided in the third and thirty-second clauses of the will. There is a marked distinction in the character of the two gifts made in these clauses. The gift in clause 3 is given in trust, to manage, invest and control the same and the same from time to time re-invest, and the income thereof to use and expend in defraying the current expenses of the home for old men to be erected as thereafter provided, while as to the gift made in clause 32 there is no authority to invest or re-invest the same for the purpose of accumulating a fund for any purpose, but, on the contrary, the gift is made with specific directions to use and expend the same in the erection of a suitable building to be used, managed and controlled by the board of trustees as a home for old men of American birth, only, separate and apart from the Old People's Home. The purpose of these gifts is so clearly and aptly set forth as to leave no question as to the intention of the testator in respect to each bequest and the powers and duties of the donees in respect thereto. By the one clause he provides for the construction of a building for the use of old men of American birth, only, and by the other clause he provides a permanent fund for its

maintenance; and there is no more authority for investing and re-investing the building fund for the purpose of accumulating a fund than there is for the investing of the \$10,000 endowment fund in the construction of a building. The funds are not convertible funds and should not have been so treated.

That a forfeiture might be declared either from a failure of the corporation or institution which received a gift to carry out the purposes for which it was organized or to devote the funds to the purpose for which the gifts were made is clear from the language of clause 34, which provides that if any of the institutions or corporations which receive any portion of the testator's estate shall "at any time fail or cease to carry out effectively the objects and purposes for which they were, respectively, organized, and to promote which the bequests to them, respectively, are by me herein made and given," then the bequests to them shall become void. It is admitted by the demurrer that such home has not been built, as charged in the bill, and that the fund given for this purpose and the fund for maintaining the home have not been devoted to those purposes, but, on the contrary, have been invested and re-invested, without any attempt on the part of the trustees of such institution to devote the same to the purposes for which they were given. This, we think, was a clear violation of both the letter and spirit of the gifts of such a character as to render them subject to forfeiture under clause 34 of the will, and as the residuary legatees do not take, appellant, as the sole heir of the testator, has a right to declare and enforce such forfeiture. It was evidently the hope and expectation of the testator that no forfeiture should ever be declared, and for that reason he gave no more specific directions as to what disposition should be made of the fund in case of such eventuality. The estate having vested, and there being no valid disposition of it in case of such forfeiture, it must be held to be intestate



property, and as such to descend to appellant as the heir-at-law of the testator. As the reversionary interest is vested in her, she, alone, has the right not only to declare a forfeiture but also to maintain her bill for the purpose of enforcing such declaration. This she has done, and upon the admitted facts in the record before us she is entitled to an accounting for that fund.

For the reasons given, the decree is reversed and the cause remanded, with directions to overrule the demurrer and for further proceedings in accordance with the views herein expressed.

*Reversed and remanded, with directions.*

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GEORGE L. PRESTON, Appellant, *vs.* EFFIE PRESTON LLOYD  
*et al.* Appellees.

*Opinion filed June 24, 1915—Appellant's petition for rehearing dismissed on his motion October 8, 1915.*

1. EVIDENCE—*complainant has burden of proof on filing bill to set aside deed.* One who files a bill to set aside a deed upon the ground that its execution was procured by undue influence and that there had never been a valid delivery of the deed has the burden of proving the allegations of his bill.

2. UNDUE INFLUENCE—*what is not undue influence.* The fact that a daughter, by appealing to the affections and sense of justice of her aged father, who was about to marry a young woman whom the daughter did not know, induced him to make a deed to her, reserving a life estate in himself, in accordance with his long declared intention that the land should belong to his daughter and her children, does not constitute undue influence.

3. DEEDS—*transactions occurring after delivery of deed do not affect the validity of the delivery.* If a deed has been delivered to the grantee without any condition of which she is aware or which she has authorized, the validity of such delivery is not affected by conversations or transactions subsequently taking place between the grantor and third persons.

4. APPEALS AND ERRORS—*when Supreme Court will not disturb the chancellor's findings.* Where the evidence in a chancery case

heard by the chancellor in open court is in irreconcilable conflict and so evenly balanced on the important features that the decision of the case must depend wholly upon which witness or group of witnesses is to be believed, the Supreme Court will not disturb the chancellor's findings as to the facts.

CARTER, DUNN and COOKE, JJ., dissenting.

APPEAL from the Circuit Court of DeKalb county; the Hon. MAZZINI SLUSSER, Judge, presiding.

BULKLEY, GRAY & MORE, and H. S. EARLY, for appellant.

CHILTON P. WILSON, and CLIFFE & CLIFFE, for appellees.

Mr. JUSTICE WATSON delivered the opinion of the court:

Appellant filed his bill in the circuit court of DeKalb county on February 24, 1913, to set aside a deed which he had made on the 13th day of that month conveying to his daughter, Effie Preston Lloyd, appellee, his farm of 220 acres, upon the ground of undue influence exercised to procure the execution of the deed and the further ground of non-delivery of the deed. Both Mrs. Lloyd and her husband were made defendants to the bill, and a temporary injunction was prayed for and issued, restraining them from conveying or encumbering the farm until the issues should be heard and determined. Answer was filed by appellees, issues were joined and the cause was tried by the chancellor upon the testimony of the witnesses produced, sworn and examined in open court. The proofs were heard on October 11, 27 and 28, 1913, and January 10, 1914. The cause was decided May 21, 1914, the equities found to be with appellees, and a decree was entered dismissing the bill for want of equity. On that day, by leave of court, an amendment was filed to the bill alleging a condition precedent to the delivery of the deed, to-wit, that a provision

of \$400 per annum to be paid to his intended wife after his death, out of the proceeds of the farm, should be agreed to and arranged for, and that prior to delivery of the deed the grantor should see his fiancé and ascertain whether or not she would agree to the proposed settlement.

The evidence shows that George L. Preston, appellant, an old citizen of DeKalb county, had lost his wife when he was about seventy-five years of age, some two or three years before the happening of the events now in controversy. She had been an invalid for twenty years or more and had received loving care and attention from her husband and from their only child, Effie Preston Lloyd. Mrs. Lloyd, with her husband and three children, the eldest a boy of twelve, lived in Chicago. Preston had been very fond of his daughter during all of her life and had given her every advantage of education and culture within his power. He was also much attached to her children, particularly to Charles Herbert, the boy above mentioned. He had frequently during the years preceding the execution of the deed described in his bill, expressed his purpose to give the farm in question to his daughter and through her to her children. Shortly before February 12, 1913, he entered into an engagement to marry Eleanor Maude Touche, informing her fully and correctly as to his ownership of the farm in question as well as a comfortable residence property in Sycamore and some personal property, and on that day he informed his daughter, by letter, of his intended marriage to Miss Touche, and invited her and her family to attend the wedding on February 17, 1913. Mrs. and Mr. Lloyd, with the boy, Charles Herbert, went at once to Sycamore, to the house of her father, for the purpose of securing further information concerning the proposed marriage and about her father's fiancé, whom they did not know, and for the purpose of inducing her father to convey to her the title to the farm prior to the marriage. On the evening of that day the subjects mentioned were

talked over by the Lloyds and Preston at much length. Mrs. Lloyd asked her father to convey the farm to her, saying he had always said she and her children were to have the farm; and unless he should make the conveyance she feared she would get none of his estate. She reminded him he was growing old, that some members of his family had suffered mental derangement in old age, and she was afraid the farm would be gotten away from him. She told him she knew he wanted to do right and she felt now was the time to arrange those matters. Preston said he was willing to make a will giving her the farm, but both Mr. and Mrs. Lloyd objected to that as being subject to revocation. The boy also pleaded with his grandfather to make the deed. Preston expressed no objection to their ultimate ownership of the farm, but said he thought he ought to talk it over with his intended wife. On the following morning, and after a comparatively sleepless night, Preston and Lloyd went together to the office of George Brown, a lawyer, who for many years had been the friend and at times the legal adviser of Preston, having arranged with Mrs. Lloyd to come there in the event she should be needed and sent for. The matter of making the deed was discussed by Preston, Brown and Lloyd at great length during the several hours of the forenoon, on the basis of a conveyance of the fee of the farm to Mrs. Lloyd with a reservation of the use and control of the farm for life to Preston. Brown then and later strongly advised against the conveyance in any form. Preston and Lloyd returned to the Preston home at noon, there had dinner with Mrs. Lloyd, and afterwards did some trifling work about the place. Then they returned to Brown's office and spent the remainder of the afternoon in further discussion of the proposed conveyance. On that occasion Brown completed a pencil memorandum of the deed to be drawn, which had been begun in the forenoon, and of a paper to be shown to and signed by Miss Touche informing her of the trans-

action and inducing her consent thereto, which paper is variously designated a "notice" or a "consent," and is as follows:

"Whereas, a marriage is about to be solemnized between George L. Preston, of the city of Sycamore, in the county of DeKalb and State of Illinois, of the one part, and Elinor Touche, of the city of Oak Park, in the county of Cook and State of Illinois, of the other part; and whereas, it has heretofore been the desire and intention of the said George L. Preston to convey and transfer certain real estate to his daughter, Effie Preston Lloyd, it being a farm consisting of about 220 acres situated on sections 32 and 31 in the township of Genoa, in said county of DeKalb, Illinois; and whereas, he having conveyed the said real estate, by deed, to the said Effie Preston Lloyd:

"Now, therefore, be it known that the said George L. Preston has, prior to the said contemplated marriage, informed and duly notified me of the fact that he had made and delivered a deed conveying and transferring said real estate to said Effie Preston Lloyd, and I acknowledge that the same has been done with my knowledge, consent and approval.

"Dated this ..... day of February, 1913."

The proof is not very clear as to the precise time when the deed and notice, in the final draft, were completed, but it was late in the day, and it became necessary for Preston and Lloyd to return to Brown's office in the evening. They had supper at home with Mrs. Lloyd and returned to Brown's office, where Preston signed the deed and acknowledged it before Brown as a notary public. The deed is a statutory warranty deed, made in consideration of one dollar and natural love and affection, correctly describing the land, and it contains the following added paragraph immediately following the description of the conveyed premises, viz.:

"Excepting and reserving from this conveyance to the said grantor, George L. Preston, for and during the term of his natural life, the exclusive, complete and entire possession, occupation, management, control, use, income, rents, issues, profits, accumulations and accretions of each, every part and all of the said real estate and premises herein above described; also the right to cut and remove from

said real estate and premises any and all trees and timber thereon or that may hereafter grow thereon, for any and all uses that he may elect; the further right to lease, let and sub-let, and from time to time lease, rent the whole or any part of said real estate and premises; the right to set and plant other trees, vines or shrubbery thereon, and the right from time to time to alter or change the buildings, fences, erect new buildings and fences, and to make any and all other improvements thereon and to do and perform any other work on any portion of said real estate that he, as grantor, desires to have done, by himself or by others under him, the same as though this conveyance were not made. Grantor agrees to pay the taxes on said real estate and keep the buildings thereon properly insured during said term."

After executing and acknowledging the deed Preston declined to receive the dollar mentioned as part of its consideration and laid the deed on a desk near him. He rose to put on his overcoat, and in his presence and with his knowledge Lloyd took up the deed and put it in his pocket. Then, or previously, Preston handed him the abstract of title, from which Brown had copied the description of the land, and upon leaving the law office Lloyd borrowed an old atlas from Brown, in order that by inspection of the county map therein he and his wife might satisfy themselves as to the correctness of the land description in the deed. At the Preston home on that night Lloyd took the deed from his pocket and Preston took the abstract from his pocket. They and the map were compared and much further conversation about the business in hand ensued. It is impossible to reconcile the testimony of the three persons present as to what then occurred. Mrs. and Mr. Lloyd testify that Preston handed over the abstract and informed his daughter that the deed, then in her husband's hands, was a nice little present for her. She complained that her husband had not had the deed recorded, and he

explained that the recorder's office closed at five o'clock in the afternoon and he would have it recorded the next morning. These statements, if true, show clearly a delivery of the deed at that time by the grantor to the grantee, regardless of whether it had been delivered at Brown's office to Lloyd. But Preston denies the action and statement attributed to him, and says the conversation about recording the deed was in a low tone between the husband and wife and not intended for him to hear, although he heard it. He says he protested he had never voluntarily parted with the deed, informing them they had no right to its possession, ought not to have it recorded, and should return it to him to keep until he should on the next day inform Miss Touche about it and secure her consent to it. On the next morning Lloyd had the deed recorded, and on the five o'clock train that afternoon, by pre-arrangement, the three went to Chicago on the way to the home of a relative in Oak Park, where they were to meet Miss Touche and her brother and brother-in-law and there explain what had been done and secure the consent of Miss Touche. Mrs. Lloyd, however, went on home,—to look after her small children, she says,—and Preston and Lloyd attended the meeting. The "notice" or "consent" was not signed by Miss Touche, and there is a sharp conflict as to what was said by the various persons who participated in the interview. Since nothing then said can legally affect the occurrences of the day before it would serve no useful purpose here to set forth in detail the various statements made, but Lloyd there maintained the deed had been on the previous day voluntarily executed and delivered by Preston, while the latter vehemently denied the statement and with some heat and violence accused Lloyd of unfair dealing. He also then insisted the deed was to be delivered only after the consent of Miss Touche thereto was obtained. In this meeting the brother and brother-in-law of Miss Touche made some criticism of Preston, holding that by the res-

ervation in the deed he had provided for himself but had not provided sufficiently well for his intended wife. They suggested the Sycamore home would not bring her any income after his death if occupied by her as a home, and that some arrangement should be made whereby Mrs. Lloyd should pay her a portion of the income from the farm after his death. Conversation upon the various aspects of the business continued among varying groups of those assembled until near midnight, when Preston and Lloyd went to the home of Mrs. Lloyd, in Rogers Park. The next morning the three talked over what had taken place in Oak Park, and Preston asked his daughter to agree to pay to Miss Touche, after his death, a portion of the income from the farm and "to do anything to satisfy her." Mr. and Mrs. Lloyd then arranged a meeting with Miss Touche's brother and brother-in-law at one o'clock on that day at the office where Lloyd was employed. Those present at the meeting were the Lloyds, Touche, Addenbrooke, and Gray, the manager of the office. Those representing Miss Touche endeavored to induce Mrs. Lloyd to agree to pay her, annually, a portion of the farm income after the death of Preston, which she declined to agree to, and no other subject was there discussed and no charge made that Mrs. Lloyd did not own the land or come fairly by its ownership. Friendly relations between Preston and his daughter and her family were then terminated and have never been resumed. His wedding was postponed, and it occurred on February 27, 1913, three days after the bill was filed.

We have in this opinion referred to the irreconcilable nature of the testimony of the witnesses upon some of the important phases of the case. It is not improper to add that upon every disputed question the testimony of the witnesses is squarely contradictory and antagonistic, according to the bias or interest of the respective witnesses, except in one instance, viz., if there was a condition precedent to the delivery of the deed resulting from the conversations in



Brown's office, to the effect a third instrument should be prepared and executed by Mrs. Lloyd by which she should agree to pay a stipulated sum or a portion of the farm income, annually, after her father's death, to his widow, such condition was never made known to Mrs. Lloyd and no witness testified she had knowledge of it. According to her evidence, which upon this point is uncontradicted, the first she knew of such a condition being contended for was in the trial of the cause. It was not disclosed, even by the bill, prior to the amendment of May 21, 1914. The usual conflict of evidence is found concerning the condition precedent. Both Preston and Brown testify it was contended for at Brown's office by Preston and agreed to by Lloyd, so far as he had power to agree, but it is shown neither of them ever made such claim, within the knowledge of the appellees, prior to their giving testimony in the cause, and Lloyd denies it.

Answering the contention that Brown is a disinterested witness, it is shown by appellees that he for many years was the personal friend and legal adviser of Preston; that he strongly advised against the making of a deed; that he and one of the counsel of record for Preston occupy adjoining rooms in the same suite of offices, using the reception and library rooms in common; that he was consulted in the preparation of the bill, at least as to the evidentiary facts within his knowledge; and that he was contradicted by Preston himself, as well as by circumstances in proof, in his statement that he was to prepare the alleged agreement for Mrs. Lloyd to sign. Preston says it was to be prepared at Oak Park after Miss Touche should sign the "consent," and no memorandum for its preparation was written by Brown.

The credibility of witnesses is usually determined by the consideration of the court or jury before whom they appear, and courts of last resort are loath to interfere with the result as determined in the trial forum. (*Lines v.*

*Willey*, 253 Ill. 440; *McCormick v. Miller*, 102. id. 208.) In the instant case we are inclined to follow the above mentioned rule, the more especially as upon most of the important questions in the case the evidence is not only contradictory but is fairly evenly balanced, the result depending wholly upon which witness, or pair of witnesses or group of witnesses is believed. If numbers alone are to prevail, it may be said the preponderance as to occurrences in Brown's office is against Lloyd, both upon the question of voluntary delivery of the deed and the condition precedent; if, however, his statements as to those matters are considered in the light of all the facts and circumstances in proof there is no preponderance against him.

Again, if numbers are to prevail, the evidence of intentional, voluntary delivery of the deed, without conditions, by Preston to Mrs. Lloyd at his residence on the night of its execution is overwhelming. Against his denial of such delivery we find in the record the below quoted testimony of Lloyd, corroborated by his wife in substantial detail: "We went down to the house and took off our wraps and Mr. Preston says, 'Come out into the kitchen; I want to smoke.' We all went out there. Mrs. Lloyd sat at the side of the table, which had been pulled from the wall. I took the deed out of my pocket and Mr. Preston took the abstract out of his pocket and laid it on the table. We checked up the description of the property according to the new deed, with the atlas and with the old abstract, and during the time that we was doing that,—I was not familiar with the description of the property,—I asked Father Preston about the different descriptions, and I remember well that I asked him about one piece, and he said, 'Well, that is a little narrow strip that is west of the Genoa road.' There was a description of a triangular piece; 'that is Charles Herbert's alfalfa patch,'—meaning my son. The description of the property was gone over and checked and we believed them to be correct. Then came

a little further along in this deed the life-lease clause, and my wife started to read it and Mr. Preston asked her to read it more distinctly; that he could never hear her,—just as it was to-day. He can't hear very well and her voice does not penetrate very far, and so she started to read again, and he says, 'Let me read it—you mumble so,' and he got up. She handed him the deed and he stood under the gas jet and attempted to read it. His eyes are not very good and he could not read it, and so his daughter,—he handed it back to his daughter and asked her to read it, 'but read it slowly and distinctly,' which she did. After she read it he says, 'I guess that is all right.' Then my wife picked up this abstract that we had been looking at, and said, 'Why, there is something that I am much interested in; I have never seen it yet, papa.' 'Why,' he says, 'that is funny; it has always been right here in the safe.' The deed and the abstract and the atlas were all laid down upon the kitchen table, and it was becoming late and we thought we had better retire. Mr. Preston, as I remember it, got up, went to the closet, which is in front of the stove, and hung up his coat, as was his wont, and returned to the edge of the table and said, 'There is that abstract and deed; take good care of it; that is a mighty nice present.' My wife expressed herself in a way and I also said, 'Father, I appreciate very much the way that you have taken care of your daughter.' I then picked up the deed and the abstract and handed them to my wife, who happened to be standing right next to me there, and I told her to put them up. That was all that was said that evening, except he made the remark which he had made a time or two before, that he was glad he had done it,—'now the lawyers won't get a finger in the pie.' "

The chancellor before whom the case at bar was heard has held court for many years in the circuit and county of the trial. In all probability he knew the parties and witnesses personally, and at all events he must have been

familiar with such of the surroundings and conditions as would qualify him in more than the ordinary degree to determine the credibility of the witnesses and the probable accuracy, or lack of it, of the statements made by each. There is no serious controversy,—if, indeed, there is any controversy,—over the law applicable to the case, and we quote with approval what we said upon this subject in *Columbia Theatre Co. v. Adsit*, 211 Ill. 122: “The chancellor who entered the decree in this case saw and heard the witnesses who testified for the respective parties. The testimony of the several witnesses was conflicting and covered a wide range, as testimony usually does in similar cases, and he was in much better position than this or any other appellate tribunal to judge of the weight that should be given to the testimony of the respective witnesses. \* \* \* The rule in chancery practice in this State is too firmly established to be now shaken or overturned, that when the chancellor sees the witnesses and hears them testify, and their evidence is conflicting, the decree entered by him will not be disturbed upon a question of fact by an appellate tribunal unless it appears that the findings of facts are clearly and palpably wrong.”

We cannot say the findings of the chancellor upon the questions of delivery of the deed and condition precedent were so manifestly against the weight and preponderance of the evidence as to require a reversal of the decree, but, on the contrary, we are inclined to the opinion they are in accordance with a sound view of the preponderance of the credible evidence bearing upon those questions.

Upon the issue of undue influence in procuring the execution and delivery of the deed, chiefly relied upon as the bill stood before amendment, we think appellant has not made such proof as would justify setting aside and vacating the deed. Mrs. Lloyd prudently consulted legal counsel and a physician, after receiving notice of the proposed marriage of her father at the age of seventy-seven years,

with a view of protecting the rights of himself and of herself and family in his property through a conservatorship, if the same should appear necessary. He knew of this, but her appeal to him to put in writing his promises to her concerning the farm appears to have been made through his affections and his sense of justice, and this is not wrongful and is not undue influence, as we held in *Burt v. Quisenberry*, 132 Ill. 385, *Dickie v. Carter*, 42 id. 376, *Francis v. Wilkinson*, 147 id. 370, and *Sargent v. Roberts*, 265 id. 210. Appellant assumed the burden of proof, and to sustain his bill was required to show undue influence or non-delivery of the deed by a clear preponderance of the evidence, and this we hold he failed to do. *Kaenders v. Montague*, 180 Ill. 300; *Valter v. Blavka*, 195 id. 610; *Thompson v. Calhoun*, 216 id. 161.

Finding no error in the decree of the circuit court requiring its reversal, the decree is affirmed.

*Decree affirmed.*

CARTER, DUNN and COOKE, JJ., dissenting.

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ROBERT E. TURNERY *et al.* Appellees, *vs.* BERTHA SHRIVER.  
*et al.* Appellants.

*Opinion filed June 24, 1915—Rehearing denied October 8, 1915.*

1. DEEDS—a building restriction in a deed will be construed in the light of circumstances existing at execution. In construing a building restriction in a deed the court may look to the circumstances surrounding the parties at the time the deed was executed and the object sought to be accomplished by such restriction.

2. SAME—what is meant by the "front" of corner lot. Where each lot in a subdivision faces upon a north and south street and there is an alley running north and south through each block and building lines marked on the plat running north and south through the lots thirty feet from the north and south streets, a provision in a deed to a corner lot that "no building shall be erected upon the front three-fifths of such lot facing upon the side street" will

be held to mean the three-fifths of the lot fronting upon the north and south street, and the east and west street will be regarded as the side street.

3. *SAME—what is not ground for relieving party from building restrictions.* One who purchases property subject to building restrictions contained in the deed, which are reasonable and not contrary to public policy or some positive rule of law, cannot be relieved from such restrictions merely because he can use the property more advantageously without them.

4. *INJUNCTION—the party who violates injunction acts at his peril.* Where a court having jurisdiction of the subject matter and of the person of the defendant enjoins the erection of a building in violation of a building restriction the defendant acts at his peril in completing the building, and does so subject to the power of the court to compel the removal of the building or grant such other relief as may be proper under the circumstances.

APPEAL from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, (SAMUEL ADAMS, and FRED BARTH, of counsel,) for appellants.

JOHN S. HUMMER, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Appellees filed their bill in chancery in the superior court of Cook county to enjoin appellants from constructing a store building on their lot in what is known as Sheridan Drive subdivision of the city of Chicago, in violation of certain conditions in the deeds by which the lots in the subdivision were sold and conveyed. Appellants answered the bill, denying the building they contemplated constructing would constitute a violation of such building restrictions, and further alleging that by reason of changed conditions and acquiescence on the part of the lot owners in repeated violations of such restrictions the same were no longer valid and enforceable as building restrictions. Issue was joined and the case referred to a master in chancery to take the proofs and report the same, together with

his conclusions as to the law and the facts. The master made his report finding in favor of appellees and recommending that a decree be entered in accordance with the prayer of the bill. Upon the coming in of the master's report appellees filed their supplemental bill, alleging the building had been completed during the pendency of the suit and praying for a mandatory injunction requiring appellants to remodel and reconstruct their building so as to conform to the building restrictions in their deed. Appellants answered the supplemental bill, and a hearing was had before the chancellor on the issues raised by the supplemental bill and answer. At the conclusion of the hearing on the issues raised by the exceptions to the master's report and the issues made by the supplemental bill, the court entered a decree finding the issues in favor of appellees and granting the relief prayed in the original and supplemental bills. From this decree the appellants have prosecuted their appeal direct to this court.

It appears from the pleadings and proofs that appellant Bertha Shriver is the owner of lots 47 and 48 in Sheridan Drive subdivision of the city of Chicago. Lot 48 is situated at the northwest corner of the block, at the intersection of Wilson and Magnolia avenues. The lot is 145.5 feet in length along Wilson avenue and 42 feet in width on Magnolia avenue. Wilson avenue runs east and west through the subdivision and Magnolia avenue north and south. Lot 47 adjoins lot 48 on the south. There is an alley 16 feet wide running north and south through all of the blocks in the subdivision, and a building line running north and south through the lots is marked on the plat, located back 30 feet from the front or street line of the lots. Appellees are the owners of lot 99 in the subdivision. It faces east on Magnolia avenue and is the third lot south, across the street west from lot 48 in question here. The subdivision was laid out by the Graceland Cemetery Com-

pany in 1891 and contained 354 lots, all of which front, according to the plat, on the north and south streets. All lots were sold by reference to the plat of the subdivision, which contained the following statement as to the building line restriction, viz.: "No building shall be erected or placed upon that portion of any lot between the building line crossing said lot (wherever shown on the annexed plat) and the front line of such lot." In addition to this statement the building line is plainly marked on each lot in the block at a distance of 30 feet back from the front of each lot. On the plat lot 48 is shown as a corner lot, with the building line passing across the Magnolia avenue front of that lot and 30 feet east of Magnolia avenue. No building line restriction of any kind is indicated on that portion of the lot bordering upon and extending along Wilson avenue. In addition to the building line restrictions shown by the plat the deed from the cemetery company to the grantor of appellants contained the following provision: "Every corner lot in said subdivision (except those fronting on Clark street) is sold and conveyed upon these further conditions: that no building shall be erected upon the front three-fifths of such lot facing upon the side street, nor shall any stable, barn or privy be placed on the front three-fifths of such corner lot." The building which the appellants constructed is a one-story brick building with seven separate apartments or stores, all of which front upon Wilson avenue, and occupies all of that portion of lot 48 between the building line 30 feet east of Magnolia avenue and the alley at the rear of the lot, so that a considerable portion of the building occupies a part of the front three-fifths of that lot, and the stores front on Wilson avenue.

The main controversy in this case is as to whether Wilson avenue or Magnolia avenue is a side street, within the meaning of that term as used in the deed, and as to



whether or not conditions have so changed as to render the conditions no longer valid and enforceable as building restrictions.

Appellants insist that as lot 48 is a corner lot it has two fronts,—one on Wilson avenue and the other on Magnolia avenue,—and that as the conditions now exist Wilson avenue is the main street of the subdivision, and that in constructing the building facing on Wilson avenue they are not violating the terms of the condition which provide that “no building shall be erected upon the front three-fifths of such lot facing upon the side street,” etc. Their argument is that the evidence shows Wilson avenue is now one of the principal thoroughfares of the subdivision by reason of the establishment of an elevated station on that street, a bathing beach, picture shows, theatres, and other places of amusement and business of different kinds east of there, upon Wilson avenue and the adjoining street. In determining what is meant by this provision in the deed it is proper to look at the circumstances surrounding the parties at the time of its execution and the objects and purposes intended to be subserved thereby. Without such knowledge it would be impossible to fully understand the meaning of the instrument and give effect to the words of which it is composed. (*Adams v. Gordon*, 265 Ill. 87.) When the deed is read in the light of the conditions and circumstances under which it was executed, there can be but little doubt as to the true intent and meaning of the parties by the language used in the deed. At the time the subdivision was laid out the land was vacant and unplatted and there were no front or side streets and no main traveled thoroughfares. When reference is had to the plat made at the time the subdivision was laid out, it will be seen that all of the lots front upon the north and south streets, that an alley runs north and south through the blocks, and that all of the lots abut upon such alleys. As commonly understood, the rear of a lot is that portion

abutting upon the alley, and the front is that portion opposite the rear of the lot which faces upon the street, and the side would be that portion of the lot adjacent to the lot or lots on either side of it. While it is true that a corner lot does, in a certain sense, front upon both streets, still, in the strict sense of that term, that portion of the lot, only, which is opposite the rear and faces upon the street is properly designated as the front of such lot. In this case all doubt upon the subject is removed by the building line indicated on the lots, including the corner lots, located 30 feet back from the line of the north and south street, together with the further statement on the plat that "no building shall be erected or placed upon that portion of any lot between the building line crossing said lot (wherever shown on the annexed plat) and the *front line of such lot*," which in no uncertain terms designates that portion of the lots upon which the building line is indicated as being the front of such lots. No building line restrictions of any kind are indicated upon that portion of any of the lots adjacent to and extending along the east and west streets. When the deed is read in the light of these facts and the other evidence in the record, we think it very clear that by the words "side street," as used in the deed, were meant those streets in the subdivision upon which the lots did not face and not those streets upon which all of the lots in the subdivision fronted.

It is next insisted that the covenants contained in the deed have been abandoned because no general plan of improvement has been adopted and uniformly adhered to and carried out with respect to buildings upon the lots in the subdivision; that there were different restrictions in various deeds, and that in many instances the building line restrictions have been violated without protest; that by reason of these facts and the change in conditions that has taken place in the subdivision in the last few years the appellees are estopped from enjoining the appellants from

making the contemplated improvement. A great deal of testimony was introduced bearing upon these questions by the respective parties, together with numerous photographs, plans and diagrams of the location, situation and exterior and interior arrangements of the various buildings in that vicinity. It does appear from the evidence that in some instances bay windows, porches and railings have been extended over the building line, and that flat-buildings have been constructed on some of the corner lots having entrances on the side streets as well as the front streets, although all of those buildings are apparently so designed and constructed that their fronts and main entrances are upon the north and south streets. There is also testimony to the effect that in one or two instances the cemetery company has attempted to release the grantees of corner lots from the restriction against erecting buildings on the front three-fifths of the corner lots facing the side streets, and that there is no uniformity in the language of the restrictions in the deeds, in that the deeds executed subsequent to 1900 require the grantees in such deeds, their heirs and assigns, to covenant for the benefit of the owners, from time to time, of the other lots in said subdivision that they will observe the building restrictions, and not sell soil and sand, nor build houses on the lots of less value than \$3500 within seven years, etc. We have examined the volume of testimony and the numerous exhibits offered on this question, as well as upon the question of the change in conditions that has taken place in the subdivision in the last few years, and from our examination of the same we are unable to say that the finding of the master, which has been approved by the chancellor, is not in accordance with the greater weight of the evidence upon those questions. After giving the matter careful consideration we feel that we would not be justified in disturbing the findings of the decree in this respect in the present condition of the record.

While it undoubtedly may be a hardship on appellants to enforce a strict compliance with the provision in question in their deed and thereby prevent them from devoting their property to a use which, by reason of the subsequent development of the subdivision and change in conditions and travel, is apparently advantageous to them, still that fact, alone, does not warrant us in relieving them from the obligations of the bargain which they have voluntarily made. Appellants knew, when they purchased the lot, of this restriction in the deed and the manner in which it might be used and the restrictions to which it was subject. These matters were all undoubtedly taken into consideration by the parties in fixing the price of the lot at the time it was sold, and if such restriction was a damage to the lot appellants received full advantage of the same at the time they purchased the lot. At any rate, they purchased the lot subject to those conditions and restrictions, and are now bound by them so long as the restrictions are reasonable and not contrary to the public policy or some positive rule of law. We find nothing in the restrictions in question of that character, and it is therefore but equitable to hold that they must abide by the terms of the contract they have made and by virtue of which the land was conveyed to them. *Frye v. Partridge*, 82 Ill. 267; *VanSant v. Rose*, 260 id. 401.

It appears from the evidence that after this proceeding was instituted, and while the same was still pending, the appellants completed the construction of their building, and that the same is so constructed as to violate the building restrictions contained in their deed; also that while the building was in the course of construction they were repeatedly warned that if they constructed the same in such a manner as to violate the terms of their deed they would do so at their peril. After the cause had been heard by the master and his report made, appellees filed a supplemental bill setting up the fact of the completion of

the store building in violation of the covenants in the deed and asking for a mandatory injunction compelling appellants to reform and reconstruct their building so as to conform to the conditions in the deed, and the court, by its decree entered upon the original and supplemental bills, not only permanently enjoined appellants from constructing a building on the front three-fifths of lot 48 fronting on Wilson avenue, but also ordered them, within one hundred days, to take down and remove that part of the said building heretofore constructed which is located on the front three-fifths of said lot, or to so alter or reconstruct that part of said building on that part of the lot that the same shall face,—that is, have its front,—wholly on Magnolia avenue, and shall not face,—that is, have its front,—on Wilson avenue; and that a mandatory writ of injunction issue forthwith in accordance with the provisions of the decree. Appellants insist that the decree is palpably erroneous in this respect. The rule in this State is, that where a bill for an injunction has been filed and the court has acquired jurisdiction of both the person and the subject matter of the suit and the defendant does any act which the bill seeks to enjoin, such party acts at his peril and subject to the power of the court to compel a restoration of the status, or to grant such other relief as may be proper under the particular circumstances of the case. (*New Haven Clock Co. v. Kochersperger*, 175 Ill. 383.) Under the facts as disclosed by this record we see no error in the decree of the superior court in this respect.

Appellants will be allowed four months from the filing of this opinion in which to comply with the decree of the superior court.

For the reasons given, the decree will be affirmed.

*Decree affirmed.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. THOMAS P. KEYES, Plaintiff in Error.

*Opinion filed June 24, 1915—Rehearing denied October 7, 1915.*

1. CRIMINAL LAW—*what is a confidence game and not merely a breach of contract.* One who advertises for a partner in the moving picture business, obtains the confidence and money of his victim by contracting to sell him an interest in a moving picture theatre and thereafter refuses to carry out his agreement or return the money is guilty of obtaining money by means of the confidence game and not merely of a breach of contract, where the evidence shows that he did not enter into the contract in good faith, with the intention of keeping it, but merely to obtain the money of his victim and thereby defraud him.

2. SAME—*what evidence admissible to show guilty knowledge.* In a prosecution for the confidence game, where the accused advertised for a partner in the moving picture business and obtained the confidence and money of the prosecuting witness by entering into a contract purporting to sell an interest in a moving picture theatre, proof that after such transaction the accused advertised three times for partners and each time made a similar contract with different persons for the sale of an interest in different moving picture theatres, failing each time to carry out his contract or return the money, is admissible as tending to show guilty knowledge and to disprove good faith.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. THEODORE BRENTANO, Judge, presiding.

STEDMAN & SOELKE, for plaintiff in error.

P. J. LUCEY, Attorney General, MACLAY HOYNE, State's Attorney, and C. H. LINSOTT, for the People.

Mr. JUSTICE COOKE delivered the opinion of the court:

Plaintiff in error, Thomas P. Keyes, was indicted in the criminal court of Cook county for obtaining the money of Rudolph Reiger by means and use of the confidence game. He was found guilty in manner and form as charged in the indictment and sentenced to the penitentiary under the Indeterminate Sentence act.

The evidence offered by the People tended to prove that Keyes advertised in one of the daily papers of the city of Chicago during the month of November, 1912, for a partner in the theatre business. Reiger answered the advertisement and met Keyes in his office, at 35 South Dearborn street, on November 26, 1912. Keyes offered Reiger a one-fourth interest in a theatre in Paw Paw, Michigan, which he then had leased for the period of one year from December 1, 1912, with an option of four years more. Reiger saw Keyes twice on that day. On the first visit Keyes referred him to a film company on Lake street to ascertain his responsibility. Reiger called there, returned to the office of Keyes, informed him that the reference was satisfactory, and the following contract was executed by the parties:

*"Know all men by these presents:* This agreement, made and entered into by and between Thomas P. Keyes, party of the first part, of Chicago, Illinois, and Rudolph Reiger, party of the second part, of the same place:

*"Witnesseth:* The party of the second part has this day and date paid to Thomas P. Keyes the sum of \$400 (four hundred) and will pay the further sum of \$100 (one hundred) out of his earnings of any theatre that he is connected with, with me, to be paid as follows: All over and above the sum of \$15 (fifteen) a week to apply until the sum of \$100 (one hundred) is paid, at which time the said Reiger has \$500 (five hundred) interest in the theatre at Paw Paw, Michigan, which the said Keyes has leased, and known as the Longwell Opera House. Should the said Keyes desire to sell this lease and business at any time, the said Reiger is first to receive the amount of money that he has invested in said theatre, with at least 6% (six per cent) added, or one-fourth the profits on said investment. The said Reiger is to commence learning the business under the said Keyes' instructions here in Chicago, and as soon as he gets the run of the business he is to have charge of the theatre at Paw Paw, Michigan, and to receive a salary of \$15 (fifteen) up to the first day of January, 1913. After that time he is to receive for his services the sum of \$25 (twenty-five) a week out of the business first, before any division of the profits is made. After receiving his salary a division of the profits is to be made each month on the basis of one-fourth of the profits going to said Reiger and the balance to said Keyes. Mr. Reiger is to keep a true record of all of the money received in the man-

agement of said business, and also a book of expenses and receipts, of money paid out, and balance the same on the first day of each and every month. Mr. Reiger is to have charge of the cashier and the general management of the theatre at Paw Paw, pay all bills and receive all money and hold the other employees responsible.

"After the first day of January, 1913, if Mr. Reiger is competent to handle a large theatre said Keyes reserves the right to transfer him to a larger house, and his interest to be on the same basis as at Paw Paw, Michigan. Should the said Reiger and Keyes decide at any time to dissolve this partnership, the said Keyes reserves the right to pay Mr. Reiger his investment back with 6% (six per cent) added, or one-fourth of the profits, and take his interest off his hands, in the event of their not getting along satisfactory together, by giving sixty days' notice in advance.

"Mr. Reiger is to keep a bank account, deposit his money in a safe place and be responsible for all money received or expended, and to furnish Mr. Keyes, at his Chicago office, 35 South Dearborn street, a daily statement of the receipts and expenses. Reiger is further secured by Keyes' note for \$400 for sixty days.

"In witness whereof we have hereunto set our hands and seal this 26th day of November, A. D. 1912. Executed and signed in duplicate.

THOMAS P. KEYES, (Seal)  
RUDOLPH REIGER. (Seal)"

Keyes gave Reiger a receipt for the \$400 paid. Reiger insisted that he also give him a judgment note, which he did, whereupon the provision, "Reiger is further secured by Keyes' note for \$400 for sixty days," was inserted in the contract. Reiger, who had been shown a lease on the Paw Paw theatre property, insisted upon having an investigation made of the title to the property and as to whether the lease had been executed by the owner. Accordingly Morris Frisch, a clerk in a law office, was engaged to go to Paw Paw and make this investigation, his expenses being defrayed by Reiger and Keyes, jointly. Frisch reported that the lease had been executed by the party having the title to the property, and Reiger was satisfied with the transaction. Keyes paid but one month's rent on the Paw Paw lease and he never opened that theatre. Although Reiger repeatedly requested Keyes to fulfill his part of the contract, teach him the theatre business and put him to work, his requests were never complied with. Rei-



ger testified that on a few occasions Keyes allowed him to take tickets at the door of a theatre he operated in the city of Chicago, for half an hour to an hour at a time. Keyes testified that he offered to teach Reiger the theatre business and allowed him to take tickets for more than a week at a theatre he was operating.

Reiger, who was a native of Hungary and had been in the United States for seven years, was a man of scant education and a carpenter by trade. It appears that during the period of Reiger's dealings with him Keyes operated or had an interest in a moving picture show or show-house at 508 South Kedzie avenue, in one at 2648 North avenue and in one at 3255 Ogden avenue, in the city of Chicago, and in houses at Moline, Illinois, Racine, Wisconsin, and Paw Paw, Michigan. As has been noted, the house at Paw Paw was never opened or operated by Keyes. The house at 2648 North avenue, in the city of Chicago, was operated for four days, when Keyes sold his interest therein, and the house at 3255 Ogden avenue was never opened or operated by Keyes but his interest in the lease was sold while the place was closed. The lease of the theatre in Moline was secured in the fall of 1912. Keyes spent considerable time in furnishing and fitting up the house, and his lease was canceled on February 13, 1913. As to just what periods of time the houses at 508 South Kedzie avenue and at Racine, Wisconsin, were operated does not satisfactorily appear from the evidence. Reiger testified that the only work he was given to do by Keyes was in the line of his trade, in doing carpenter work in the various places where Keyes claimed to be interested, and in painting and helping generally to re-furnish and re-fit these places. He testified that Keyes paid him during this time between \$60 and \$70 and that no part of the \$400 was ever returned. Keyes testified that for his services he paid Reiger \$180, but admits that that was not in full for the labor he had performed. Reiger repeatedly requested him

to either fulfill his contract with him or return him his money. He informed him on various occasions that he was out of funds and had no means to provide a livelihood for himself. On different occasions Keyes gave him small sums, varying from twenty-five cents to a dollar, with which to pay for his meals. Finally Keyes ordered Reiger out of his office and told him he would not have him "sneaking" around there any longer.

The only contention made is that the facts proven do not constitute the offense of procuring money by means and use of the confidence game but show merely a breach of contract.

For the purpose of showing the intent of plaintiff in error and guilty knowledge on his part, it was proven that in September, 1912, Owen B. Young, a bricklayer, who resided in the city of Chicago, answered a similar advertisement which he saw in the *Chicago Daily Tribune*, and which was in substance: "Wanted—Young man to take part interest in a theatre; \$600 required; quick action," and that Young entered into a written contract with Keyes, whereby Keyes, for the sum of \$600, sold him an interest in the theatre at 3255 Ogden avenue, which the contract recited Keyes was about to become the owner of. This contract is similar in terms to that entered into by Reiger, and refers to the \$600 which was paid by Young to Keyes as a loan, as security for the performance of the covenants entered into by Young. Young's experience with Keyes tallied almost exactly with that of Reiger. Neither he nor Reiger had ever had experience in the theatrical business and each was to be taught the business by Keyes. Young also was referred to the film company on Lake street to ascertain Keyes' responsibility. His contract was dated September 9, 1912, and provided that he was to be paid \$10 per week until October 15, 1912, and \$25 per week thereafter until otherwise agreed upon. Keyes testified that he paid Young \$20 on this contract, but admits that

he thereafter borrowed \$40 from him. Although he was often requested to do so, Keyes never made any pretense of keeping his contract with Young.

On February 26, 1913, Fred Turnbull, a waiter in a restaurant in Chicago, answered a similar advertisement in one of the daily papers of that city, and after making inquiries of the film company on Lake street at Keyes' request, entered into negotiations with Keyes, which resulted in Turnbull paying him the sum of \$600 and entering into a written contract with Keyes on March 10, 1913, whereby Turnbull was sold a one-fourth interest in the theatre at 508 South Kedzie avenue, which the contract stated was then being re-furnished. In addition to the \$600 so paid, the contract provided that Turnbull should pay the further sum of \$200, at the rate of \$50 per month, out of the earnings of his one-fourth interest. Turnbull was to act as assistant manager of this theatre under Keyes and be paid at the rate of \$15 per week. In addition, his wife was to act as cashier for \$5 per week, and his fifteen-year-old son as operator's assistant at \$3 per week. These salaries were to commence as soon as the building was ready to open and the show started. Within a short time after this contract was executed, and before the building was ready to open, Turnbull having learned of Keyes' transactions with Reiger, Young and others, joined with them and one Samuels in procuring warrants for his arrest. Samuels did not testify, but it appears from the testimony of Keyes, and of others who overheard conversations between him and Samuels, that Samuels had entered into a similar arrangement whereby he paid Keyes \$500 to become his partner in one of his theatrical enterprises, and had failed, as had the others, to secure a compliance with the contract entered into.

It is contended that an analysis of these three transactions will show that none of them amounted to a similar offense, and that therefore they have no bearing upon the

question and evidence concerning them was improperly admitted, and that the charge against Keyes must stand or fall on Reiger's testimony alone. This testimony was properly admitted and has a direct bearing upon the intent or guilty knowledge of Keyes when he made the promises he did to Reiger, entered into the contract with him and procured his money. While it is true that Keyes was actually engaged in the moving picture business and thus far had the means of carrying out the various contracts entered into, it is apparent that he never had any intention of complying with the contracts made. The record discloses that he was continually in need of money to carry on his various enterprises, and the money secured from Young and Reiger was spent in re-fitting the house in Moline. Although he had advertised for a partner in September, 1912, and had secured one in the person of Young, he was unable or unwilling to comply with the provisions of his contract. Yet in November he again advertised for a partner. Then, after he had secured another partner in the person of Reiger, although he was still unable to comply with the provisions of the contract made with either Young or Reiger and had secured their money and spent it, he was again advertising for a partner in February, 1913, and entered into contracts with both Turnbull and Samuels. It is apparent that he did not enter into these contracts with the intention of performing them but that he never intended to perform them and his only purpose was to secure the money of his victims, and then, when their importunities became tiresome to him, to tell them, as he did Reiger, to "go to hell and get out of here." There is no basis for the contention that this is a mere breach of an ordinary business contract honestly entered into. Keyes obtained the confidence of Reiger by representing that he would teach him the theatre business and give him a one-fourth interest in the theatre at Paw Paw, Michigan, or some other theatre which he controlled, and by reason of the

confidence so inspired persuaded him to pay him the sum of \$400. It is evident that Keyes did not intend to keep the promises so made to Reiger, and that he falsely pretended that he would do so for the sole purpose of procuring \$400 of his money. If he had entered into this contract in good faith, with the full intention of keeping it, his contention that this was merely a breach of an ordinary contract would be conclusive. But the evidence shows that he took advantage of the confidence reposed in him by Reiger and thereby defrauded him of his money by a swindling scheme, and it is immaterial that the scheme took the form of an ordinary business transaction. (*Chilson v. People*, 224 Ill. 535; *People v. Depew*, 237 id. 574; *People v. Poindexter*, 243 id. 68; *People v. Bertsche*, 265 id. 272.) As we said in *Chilson v. People*, *supra*: "Where a contract apparently legal is entered into by one party with the intention of taking no step to carry it out but with the wrongful intent of causing the other to part with his money without receiving any adequate consideration therefor, such contract may, and in this case did, become a mere incident of the 'false and fraudulent scheme.' The ordinary case of agreeing to sell the gullible one a gold brick now in the possession of the aged Indian presents a breach of a contract, and yet counsel would scarcely pretend that it is for that reason any the less a confidence game. The fact that the affair was made to assume the guise of an ordinary business transaction \* \* \* is without significance. It is the substance, and not the form, that is material. The transaction in question was a 'swindling operation, in which advantage was taken of the confidence reposed by the prosecuting witness in the plaintiff in error,'—a confidence that had been obtained by deceit and false promises."

The judgment of the criminal court is affirmed.

*Judgment affirmed.*

THE CITY OF DECATUR, Appellee, *vs.* ADOLPH SCHLICK *et al.* Appellants.—THE CITY OF DECATUR, Appellee, *vs.* GEORGE SCHENCK, Appellant.—THE CITY OF DECATUR, Appellee, *vs.* ANTHONY SCHERER *et al.* Appellants.—THE CITY OF DECATUR, Appellee, *vs.* JOHN SEIBERT *et al.* Appellants.

*Opinion filed June 24, 1915—Rehearing denied October 7, 1915.*

1. MUNICIPAL CORPORATIONS—*what does not render municipal ordinance invalid.* A municipal ordinance is not invalid merely because it prohibits and penalizes acts already prohibited by statute.

2. SAME—*object of the Local Option act of 1907.* The object of the Local Option act of 1907 is to secure to the voters of certain territory the option to determine by certain methods, under certain restrictions, that prohibition of the sale of intoxicating liquor shall prevail in such territory until otherwise determined according to law.

3. SAME—*effect of provision of section 8 of Local Option act suspending operation of ordinances.* Section 8 of the Local Option act suspends the operation, in anti-saloon territory, of only such municipal ordinances as prohibit, regulate or restrict the traffic in intoxicating liquor in some manner or by some method inconsistent with the act or with the status of the territory as anti-saloon territory, and such prohibitory, restrictive or regulative ordinances as are consistent with the act are not affected by the suspension clause of section 8.

4. SAME—*city in anti-saloon territory has power to pass prohibitory ordinance.* A city located in territory which has become anti-saloon territory has power to enact an ordinance prohibiting the sale of intoxicating liquor within the city in any manner not inconsistent with the Local Option act and provide penalties for violation of the provisions of the ordinance.

5. SAME—*what provision of ordinance with reference to nuisances is not invalid.* A provision in an ordinance adopted by a city located in anti-saloon territory which declares to be nuisances all places where intoxicating liquor is sold in violation of law "or distributed or divided among the members of any club or association by any means whatever, when such distribution or division shall be an illegal sale or gift of liquor," is authorized by the provision of the Local Option act making any shift or device to evade the provisions of the act an unlawful selling, and is valid.

6. SAME—*when provision of an ordinance applies to so-called clubs.* A provision of an ordinance declaring to be nuisances all places where intoxicating liquor is sold in violation of law or distributed or divided among the members of any club or association by any means whatever, when such distribution or division shall be an illegal sale or gift of liquor, applies to a so-called club consisting of patrons of a person engaged in the business of dispensing intoxicating liquor to them for consumption on the premises, even though such person charges for the service, only, the liquors being the property of the individual patrons and stored for them by the proprietor.

7. LOCAL OPTION—*act of 1907 is directed not only to the business but to the place of business of seller of liquor.* The shift-and-device provision of the Local Option act of 1907 is intended to do away not only with the business but also with the place of business of the seller of intoxicating liquors.

APPEAL from the Circuit Court of Macon county; the Hon. W. K. WHITFIELD, Judge, presiding.

CHARLES C. LEFORCEE, and VAIL & MILLER, for appellants.

BALDWIN & CAREY, for appellee.

Mr. JUSTICE WATSON delivered the opinion of the court :

The city of Decatur brought its four actions of debt in the circuit court of Macon county against the several appellants here, seeking recovery in each action for violations of a municipal ordinance. The causes were submitted to the court for trial without the intervention of a jury, by agreement and upon stipulations of fact, the stipulations providing that in the event the defendants should be found guilty of violating the provisions of the ordinance the fine should be \$50 against each defendant found guilty, on each count of the declaration under which the finding of guilty should be made. Each declaration contained four counts, and each defendant was by the judgment of the court convicted and fined under each count of the declaration filed against him. Appeals were prayed by each and all of the

defendants, and upon certificate of the trial judge that the validity of a municipal ordinance is involved and that the public interest requires an appeal directly to the Supreme Court the appeals were perfected accordingly. In this court, upon motion and by consent, the four cases were consolidated and are to be considered and decided as one case, the opinion filed to be applicable to and decisive of all issues involved.

We are advised by the briefs of counsel there are two questions to be considered on the appeal, being, first, whether the appellee city had power to pass the ordinance under which the suits are brought; and second, whether, if the ordinance is valid, the facts stipulated constitute a breach of its provisions. These questions will be considered in the order in which they are above mentioned.

*First*—The appellants contend that under the so-called Local Option law of 1907 (Hurd's Stat. 1913, p. 1025), a city which has become or is in anti-saloon territory, as defined by the statute, has no power to pass an ordinance prohibiting and penalizing acts which are expressly prohibited and penalized by the provisions of the statute itself, basing their contention upon the construction of the language found in section 8 of the act, viz.: "In all anti-saloon territory, during the time that it continues to be anti-saloon territory, the operation of all ordinances providing for the restriction, regulation or prohibition of the sale of intoxicating liquor, or for the issuing of dram-shop licenses within any portion or the whole of such territory, so far as inconsistent with its status as anti-saloon territory, shall be suspended."

By vote of the people the town of Decatur, within the boundaries of which lies all of the city of Decatur, became anti-saloon territory in April, 1914. Thereafter, on May 25, 1914, the city council of the city of Decatur adopted the ordinance in question, which was published June 15, 1914, and which in all respects here involved is identical



with the said Local Option statute, (the sections, however, being differently numbered,) except that in section 3 of the ordinance (otherwise identical with section 14 of the act) these words are added at the close of the section, viz., "or distributed or divided among the members of any club or association by any means whatever when such distribution or division shall be an illegal sale or gift of such liquor." Otherwise sections 1, 3 and 15 of the ordinance correspond, respectively, with sections 12, 14 and 13 of the act, except their effect is limited to the city of Decatur.

Appellants concede in their brief that a municipal ordinance is not invalid by reason of prohibiting and penalizing acts already prohibited by statute. That such is the law we have decided in numerous cases, among which we are referred to *Wragg v. Penn Township*, 94 Ill. 11, *Hankins v. People*, 106 id. 628, and *City of Chicago v. Union Ice Cream Co.* 252 id. 311.

Section 8 of the Local Option law, so called, suspends the operation in territory which the people by vote determine shall be anti-saloon territory, of "all ordinances providing for the restriction, regulation or prohibition of the sale of intoxicating liquor or for the issuing of dram-shop licenses, \* \* \* so far as inconsistent with its status as anti-saloon territory," and section 9 of the statute provides for the revival of such ordinances, if not in the meantime repealed, upon the territory becoming saloon territory.

Appellants' argument is, that since, during the period when certain territory is made or becomes anti-saloon territory, prohibition prevails there by virtue of the statute, therefore an ordinance imposing prohibition in such territory, like an ordinance regulating or restricting the liquor traffic therein, is suspended until the territory becomes saloon territory, or otherwise the placing of the words "or prohibition" after the words "restriction, regulation," in said section 8, is meaningless and accomplishes no result. They further contend the adoption by the legislature of

the Local Option act is in the nature of the passing of an ordinance on the subject of regulating and prohibiting sales of intoxicating liquor, suspending other local legislation which has for its aim the same object. Admitting the appellee city could lawfully adopt ordinances in aid of the act and to render its prohibitions more effective, they nevertheless insist the direct prohibition of sales, as well as the declaration of nuisances, is provided for, once and for all, by the decision of the voters at the local option election, and with these matters the local municipal authorities have no further concern. We are not in accord with these views of appellants but rather incline to follow the rule mentioned above, to the effect the municipality may, by ordinance, restrict, regulate and prohibit the same acts which are punishable and penalized under a law of the State, so far as authorized so to do by law; (*City of Chicago v. Union Ice Cream Co. supra*, and cases there cited;) and also to apply the familiar rule in the construction of statutory enactments, viz., the intention of the legislature as disclosed by the language used in the enactment, and in view of the conditions sought to be changed, remedied or affected, should be the object of the courts in construing the law enacted. (Hurd's Stat. 1913, chap. 131, sec. 1, p. 2378; *Illinois Central Railroad Co. v. People*, 143 Ill. 434; *People v. Hinrichsen*, 161 id. 223; *Eddy v. Morgan*, 216 id. 437.) Manifestly, the object of the law was to secure to the voters of certain territory the option to determine by certain methods, under certain restrictions, that prohibition of the sale of intoxicating liquor should prevail in such territory until otherwise determined according to law. With this purpose in view the act suspends the operation, in any and all portions of such territory, of only such municipal ordinances as prohibit, regulate or restrict the traffic in such liquor in some manner or by some method inconsistent with the act or with the status of the territory as anti-saloon territory. Such prohibitory, re-

strictive or regulative ordinances as are consistent with the provisions of the act are in no way affected by the suspension clause of section 8.

We are referred by appellants to but one authority in support of their position upon this question, and that, they assure us, decides a "very similar question under the Colorado Local Option law," being the case of *People v. Miller*, 127 Pac. Rep. 228. That case was decided under a so-called local option law of the State of Colorado which provides for the repeal of all legislative enactments in conflict with its provisions, but further provides that "an ordinance passed by a municipal corporation \* \* \* prohibiting the selling or giving away of intoxicating or malt liquors shall remain in full force and effect until thirty days after an election shall be held." The Supreme Court of Colorado construed this as a positive declaration of the intention, purpose and understanding of the legislature to the effect that the act suspends the operation, after the specified thirty-day period, of all municipal ordinances prohibiting the sale or giving away of intoxicating liquor during the time the Local Option law should be in force. The case is not in point here, because the suspension provided for by section 8 of the Illinois statute operates, as we have above said, only upon such municipal ordinances as are or may be inconsistent with the status of the territory as anti-saloon territory. The addition of the clause, "so far as inconsistent with its status as anti-saloon territory," by the legislature of Illinois, clearly distinguishes our statute from that of the State of Colorado and makes inapplicable here the reasoning and decision in the Colorado case cited.

In the case of *Mayhew v. City of Eugene*, 104 Pac. Rep. 727, the Supreme Court of the State of Oregon decided a question similar to the one here presented, and said: "It is contended that the Local Option law being in force in the city of Eugene, the city has no authority to legislate in any way against the sale of liquor. We have

already held that when local option has been adopted in any city or town all laws or ordinances conflicting therewith are suspended; in other words, as long as the State law prohibits an act the city law previously in force cannot be invoked to permit said act. But there is no conflict between the Local Option law and the ordinance declaring the place where liquors are sold to be a nuisance. An act may be a penal offense under the laws of the State and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other."

We are of the opinion this is the correct rule of decision also in Illinois, and agree with appellants that it is immaterial whether the ordinance under consideration was passed by the city before or after the vote was taken under the Anti-saloon act in the town of Decatur. The city had power, under clauses 46, 48, 59, 66, 75 and 97 of section 1 of article 5 of chapter 24, known as the City and Village act, to pass the ordinance, and its provisions are not inconsistent with the provisions of the Anti-saloon statute. (*People v. Cregier*, 138 Ill. 401; *Kettering v. City of Jacksonville*, 50 id. 39; *Laugel v. City of Bushnell*, 197 id. 20.) It must therefore be sustained as a valid exercise of the legislative powers delegated by law to municipal authority.

*Second*—The facts stipulated in the Schlick and Bernard case are substantially these: Defendants, prior to the local option election of 1914, conducted a dram-shop or licensed saloon in a ground-floor room in the business district of Decatur. After the election they closed the saloon and removed from the building their stock of intoxicating liquors, retaining therein the bar and other fixtures and furniture. They leased the premises from the president of the Decatur Brewing Company, he having leased the same from the owner. Inside the front door is a cigar case. In the rear of that is a screen about six feet high,

which shuts off the view from the street of the interior behind the screen. In the rear of the screen is the bar, and also tables at which defendants' patrons may sit while eating or drinking. On or about July 7, 1914, the defendants opened the place under the name of "The Business Men's Club," and thereafter continued a business of selling lunches, soft drinks, cigars and tobacco and the business further herein described. They greatly enlarged their ice box and divided it into compartments. There was no club organization and no club dues, but about one hundred patrons of defendants ordered and bought from others, but not from defendants, beer in cases and whisky and other intoxicating liquors in bottles, and caused the same, from time to time, to be delivered at defendants' place of business, and the defendants placed each man's supply in his separate storage place, labeled with his name, keeping a portion thereof on ice in the ice-box compartment bearing the name or number of the owner. Such owner was served with his beer or whisky on request for himself, or for himself and his friends or guests who accompanied him, and he paid defendants for the service and for the storage and for the accommodation, at the rate of five cents for each pint bottle of beer, ten cents for each quart bottle of beer and ten cents for each glass of whisky or other liquor. Sugar, ice and seasoning were furnished by the defendants to the patrons and by them used in the preparation of their drinks without additional charge. The defendants gave their entire time to the conduct of the business. There was no sign in or about the place advertising the sale of lunches, and the principal part of the business of defendants was the handling and distribution of intoxicants by the methods set forth in the stipulation. They did this for profit and out of the profits paid the expenses of the place other than the original cost of the intoxicating liquors. In that cost or purchase they had no part or interest and received no commission. In the alleged club there

were no applications for membership, not necessarily any acquaintance among the members, and no requisite conditions of membership other than the purchase and ownership of intoxicants as above mentioned, the term "club" being used only for convenience. Each patron was at liberty to take away his liquors, and no one was supplied with liquors not belonging to himself except in case of guests, as aforementioned. There were no specific hours or days for opening and closing the place, and the defendants did not permit drunkenness there, and they paid no United States internal revenue tax as dealers in spirituous or malt liquors. Lunches were served and sold to such as wished to buy, and were eaten in the room and at the tables where the intoxicating drinks were served. By the stipulation it is agreed defendants were conducting the business as described, and receiving pay therefor as described above, on the dates specified in the declaration and each count thereof.

Additional facts in the Schenck case: Schenck rented from the Harpstrite estate. His place was called "The Oasis Club" and had about fifty patrons. The front room is eighteen feet wide by fifteen deep, and contains a cigar case and a writing desk. A small stock of cigars, cigarettes and tobacco is kept in this room for general sale at retail. From the rear of the room a door opens into a room eighteen feet wide and sixty-five feet deep, where the business is conducted as in the Schlick and Bernard case, except there is no bar or saloon fixtures there, the same having been removed after the township election mentioned. The door between the rooms is kept closed but not locked, and excludes the view from the street and from the front room to the rear room. At first defendant gave keys to this middle door to some of his patrons, but they were never used.

Additional facts in the John and Charles Seibert case: Their place is leased from a person who leased from the president of the Decatur Brewing Company. It has about

seventy patrons and is called "The Union Club." Defendants serve as lunch only ham and cheese sandwiches, and practically none but their patrons or members use the room in which the drinking of intoxicants goes on. After the town of Decatur became dry territory the bar and other saloon fixtures were removed and the place converted into a pool room, in which also is a cigar case. A small inner room was partitioned off, in which are stored the cases of beer and bottles of other intoxicants and where are two small tables on which the drinks are served. With the partition door closed, the interior of the small room cannot be seen from the pool room or from the street. The patrons have keys to the inner room, which are not much used.

Additional facts in the Scherer and Meisenheimer case: This is called "The Merchants' Club" and the room is rented from the president of the Decatur Brewing Company. The patrons number about ninety-five. There are three rooms, one behind the other. The front room contains a cigar case, with a few brands of cigars, cigarettes and tobacco for the retail trade. Back of this room, and separated from it by a partition, is the room in which the intoxicating liquors are served and in which the saloon bar still stands, although not much used. In this room, also, are the tables and chairs where the patrons and their guests usually sit to drink, as well as the glasses and dishes, the ice box and the intoxicating liquors. The interior of this room cannot be seen from the street or from either adjoining room with the doors closed. They are usually closed and locked, most of the patrons having keys to the door leading from the front room. The rear room is let free of rent to another person who there conducts a lunch business, and who, when desired to do so, sells lunch to the patrons and serves it to them in the middle room. In all other respects the four cases are identical.

The act commonly known as the Dram-shop law, in force July 1, 1874, is entitled "An act for the licensing of

and against the evils arising from the sale of intoxicating liquors." Under its provisions all of the State is prohibition territory in the respect that sales of intoxicants are prohibited therein, except as relief against such prohibition is obtained by the issuance of dram-shop licenses procured in accordance with the requirements of the statute. Such, also, was the declared policy of the State in legislation prior to the adoption of the Dram-shop law, the said evils arising from the sale of such liquors having been early recognized by the legislature. The said act of 1874 declared to be nuisances all places where intoxicating liquors should be sold in violation of the law, and the giving away of such liquors, or other shift or device to evade the provisions of the act, is thereby declared to be an unlawful selling.

The act known as the Local Option law, entitled "Anti-saloon territory," in force July 1, 1907, is "An act to provide for the creation by popular vote of anti-saloon territory, within which the sale of intoxicating liquor and the licensing of such sale shall be prohibited and for the abolition by like means of territory so created." This act also contains a nuisance section, and also provides, as does the ordinance here under consideration, what shall be held evasions of the law and unlawful sales, as follows:

*"Evasions of act—unlawful selling.*] Sec. 13. The giving away or delivery of any intoxicating liquor for the purpose of evading any provision of this act, or the taking of orders or the making of agreements, at or within any political subdivision or district while the same is anti-saloon territory, for the sale or delivery of any intoxicating liquor, or other shift or device to evade any provision of this act, shall be held to be an unlawful selling."

In construing the Dram-shop law in *Siegel v. People*, 106 Ill. 89, this court held the word "sale," as used in that law, is intended to have its usual signification, but the Anti-saloon law and the ordinance give additional meaning to the word "sale" by the provision above quoted. The



legislature was authorized to so extend its meaning by such enactment. (*People v. Steinhauer*, 248 Ill. 46.) In the *Steinhauer* case this court held it not necessary to allege each step of the process by which a sale might be completed, and also that the shift-and-device section of the law created and defined no independent or new offense, but was simply an exercise of the police power of the legislature in the control of the liquor traffic by preventing the violation of the law through evasion.

The question to be determined is whether the business conducted by the defendants is such a shift or device as constitutes either a breach or evasion of the provisions of the ordinance. As stated in the brief of appellants: "The defendants are in the liquor business. They dispense intoxicating liquor for money. They are ex-saloon-keepers and they do business at the old stands. Doubtless many of their old patrons store liquor with them now. Any person who wishes to store liquor with them can do so, provided he is acceptable. The liquor is drank on the premises. In two of the places the defendants serve a few articles of food, and the patrons of another can procure it in the room where they drink, from a lunch counter in an adjoining room. In the place run by the Seiberts only ham sandwiches are sold. Doubtless, however, all the places are almost exclusively patronized by the persons who keep liquor there and the lunch businesses are run simply as side lines. Are these places 'saloons' or 'bar-rooms,' as we usually think of saloons and bar-rooms? \* \* \* The agreed statements recite that the places are not clubs in any proper or ordinary sense of the word, but it strikes us that it is just as proper to call them clubs as it is to call them saloons." As stated by the appellee the question is: "Were the acts of the defendants of such a nature that they can be construed to be guilty of selling intoxicating liquors or keeping a place where such liquors were illegally sold?"

Keeping in view the declared policy of the legislature against the evils arising from the sale of intoxicants and to prohibit both the sale thereof and the licensing of such sale, and the declaration of the purpose to punish evasions as well as direct infractions of the law, we find no difficulty in determining that if defendants have succeeded in discovering and practicing a system which will enable them to conduct the liquor business, which their brief says they are conducting, with immunity, then they have also succeeded in rendering the Dram-shop law and the Local Option law a nullity. While the territory in question was not anti-saloon territory the stipulation shows the defendants were licensed keepers of dram-shops, and as such they were necessarily required to pay revenue to the municipality. They were also required to obey certain regulations as to the hours for opening and closing their places of business, as to the use or non-use of screens, exclusion of minors, closing on Sundays and election days, and other regulations not necessary to be here enumerated. None of these restrictions now embarrass them, and we are asked to declare, contrary to the established policy of the State, that notwithstanding they pay no revenue or license fee and submit to no statutory regulation, they may, unmolested, conduct the liquor business in territory where the same has been prohibited, according to law, by popular vote.

Many cases have reached the courts of last resort in this and other States in which shifts and devices varying in their special facts and methods and illustrating the ingenuity of the human mind have been submitted as successful evasions of dram-shop and local option laws. No useful purpose would be served by enumerating here the various devices relied upon for such purpose or the authorities where the history and final disposition thereof may be found. However, a few may properly be referred to and commented upon as showing the general trend of the deci-

sions of this court upon the subject and the view this court has entertained as to the public policy of our State.

In *Rickart v. People*, 79 Ill. 85, an association was formed for the avowed purpose of promoting temperance, friendship and the like. It bought the dram-shop from one of its members, elected him treasurer and he continued to conduct the business. The members paid dues, had tickets with numbers to be punched for their drinks, and they drank from community stock, paying therefor, ostensibly at least, into the community treasury. This court sustained the conviction of the bar-tender or keeper for violation of the Dram-shop law, and declared that one who resorts to any shift or device to evade the provisions of the statute is guilty of unlawful selling.

In *People v. Law and Order Club*, 203 Ill. 127, this court declared illegal any kind of device used in lieu of a direct sale, and held the dispensing of intoxicating liquors by a social club to its members, without license, to be unlawful, notwithstanding the liquor was furnished by the club at first cost, plus the expense of service, and upon tickets representing the amount of the members' "assessment." In speaking of the device there relied upon, the court said: "If such a device could be tolerated it would render all legislation on this subject nugatory,"—quoting from the *Rickart case*, *supra*; and further said, in referring to defenses invariably made in prosecutions under the shift-and-device clause of the law, that such specious defenses have received no countenance except in prosecutions for the illegal sale of ardent spirits,—citing *State v. Essex Club*, 53 N. J. L. 99.

Much that was said in the opinion in the *Law and Order Club case* was thought to be *obiter dicta* according to counsel for defendant, in the later case of *South Shore Country Club v. People*, 228 Ill. 75, but this court held it had not in the *Law and Order Club case* turned aside from the issue in the case to a collateral subject in deciding that

the transactions of the club constituted sales. In the *South Shore Country Club case* this court again affirmed and restated its position, to the effect that much ingenuity had been expended in attempting to show that the distributing or furnishing of liquors to members was not a sale, and that specious defenses of the character mentioned have received no consideration by courts except in prosecutions for the illegal sale of liquor.

While in the cases now under consideration appellants strenuously contend their places are not saloons but are more in the nature of clubs, it is nevertheless admitted in the stipulation that they have no club organization and bear the name only for convenience. If clubs, they come under the condemnation of the law as declared and construed in the opinions above referred to; and if saloons, they are condemned by the language of the Anti-saloon statute. In adopting this law to remedy the evil conditions that had arisen under the Dram-shop law, the legislature decided to do away with not only the business but of the place of business of the seller of intoxicating liquors. The shift-and-device clause of the Dram-shop law only prohibited, specifically, the giving away of intoxicants to evade the provisions of the act and "any other shift or device to evade its provisions." Even under that limited provision the condemnation by this court of the various subterfuges relied upon to defeat the object of the law has been drastic and comprehensive. Yet under the Dram-shop law the device condemned could only be condemned as being, in effect, a sale as the meaning of the word "sale" was established in the *Rickart case*, *supra*. The legislature, by extending and broadening the definition of a "sale" has created no new offense, as we held in *People v. Young*, 237 Ill. 196, but it has brought within the condemnation of the law, as sales, acts which under the former restricted definition of the term possibly might not have been regarded as having all the elements which constitute a sale.

We entertain no doubt the defendants, in conducting the business as described in the stipulation, a summary of which appears in this opinion, were violating the provisions of section 15 of the ordinance under which they were sued, in the delivery to the consumer of intoxicating liquors for the purpose of evading the provisions of the ordinance, also in the making of agreements for the delivery thereof, and that their methods of conducting the business make their conviction proper under the language in the ordinance which makes such shifts and devices unlawful selling. It necessarily follows the judgment of the circuit court was correct, also, in respect to the conviction of the defendants for maintaining places which by section 3 of the ordinance are declared to be nuisances.

The judgment of the circuit court in each of the cases appealed is accordingly affirmed. *Judgments affirmed.*

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CHARLES C. MAGINN, Appellee, vs. GEORGE W. McDEVITT  
et al. Appellants.

*Opinion filed October 27, 1915.*

1. WILLS—when power of sale by executor is not conditional on request of heirs. A provision in a will that the executor, after managing and controlling the land for a ten-year period, shall at the request of the heirs sell the land, does not make the power of sale conditional upon the request of the heirs, where the will makes no disposition of the land in case it should not be sold but shows the intention of the testatrix to be that the mortgages on the land should be paid by the executor from the rents and profits before the land was sold and that the children of the testatrix should share the proceeds.

2. SAME—when will effects an equitable conversion of land into personal property. Where the power given by will to the executor to sell land and divide the proceeds among the children of the testatrix is absolute the will operates as an equitable conversion of the land into personal property, and the children take no interest in the land which they can alienate or mortgage.

3. SAME—if interest of a child in proceeds of a sale is contingent it cannot be lawfully assigned. Where a will directs the executor, after managing the land for ten years, to sell the same and divide the proceeds equally among the named children of the testatrix "if they then all be living," but in case any of them should die before that time then the share of such child to go to the survivors if it died leaving no children or to the children of such child if any survived it, the interest of the children is contingent until the time of distribution, and no assignment of a child's interest made before that time will operate as an assignment of the proceeds of the sale if the child dies before the time of distribution.

APPEAL from the Circuit Court of Morgan county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

THOMAS L. JARRETT, for appellants.

KIRBY, WILSON & BROCKHOUSE, for appellee Charles C. Maginn.

GEORGE L. MERRILL, guardian *ad litem*, for minor appellees.

Mr. CHIEF JUSTICE FARMER delivered the opinion of the court:

The appellants, George W. McDevitt and William S. Mitchell, have prosecuted this appeal from a decree of the circuit court of Morgan county on a bill in chancery filed by Charles C. Maginn, individually and as executor and trustee under the will of Maria A. Maginn. The purpose of the bill was the partition of certain lands owned as tenants in common by Maria A. Maginn in her lifetime and complainant, who was her son, and for the appointment by the court of some competent person as trustee in place of complainant, to sell the lands of said Maria A. Maginn.

At the time of her death Maria A. Maginn was the sole owner of an 80-acre tract, and she and complainant owned as tenants in common 120 acres, each owning the undivided one-half. She died testate November 14, 1904, leaving a

husband surviving her, and her children, Mary J. Nipper, Elizabeth A. Carson, Ida M. Schramm, John F. Maginn and complainant, Charles C. Maginn, as her only heirs-at-law. By the first clause of her will she directed the payment of all her just debts. As the second clause of the will is involved in this litigation it is here set out in full, except the description of the land:

"*Second*—It is my will and I hereby authorize and order my executor hereinafter to be named to take charge of my farming lands situated in the county of Morgan and State of Illinois [describing the same.] To control, to lease, to collect rents, to keep the buildings situated thereon insured in their fair insurable value for the benefit of my estate; to pay all just taxes and assessments assessed against said property by the proper taxing authorities; to keep up all necessary repairs thereon, and after having paid all proper charges and expenses in so doing, my said executor shall apply any surplus in his hands, received from the rental of said lands, to the payment of the mortgaged indebtedness of said lands; my said executor to take charge of said lands immediately after my demise and to continue in such control and management for the term of ten years, at the expiration of which time my said executor shall, at the request of the heirs of my estate, proceed to sell my undivided one-half interest in the tract of land first mentioned and all of my 80 acres last mentioned to the best possible advantage for my estate, and to divide the proceeds equally between my children, to-wit: John F. Maginn one-fifth; to Mary Jane Nipper one-fifth; to Elizabeth Ann Carson one-fifth; to Ida May Schramm one-fifth; to Charles C. Maginn one-fifth, if they then all be living; but in case any of my above named children shall depart this life before that time, leaving no children, then the share or shares which such deceased child or children would have received if living shall be equally divided between my then living children, but in case any of my chil-

dren shall die leaving a child or children surviving them, then the share or shares of such deceased child or children shall in all cases be divided equally between their respective children, each child's share going to that child's children."

Charles C. Maginn was named in the will as executor and duly qualified as such.

After the death of testatrix, her son John F. Maginn, who was also called Fred Maginn, became indebted to the banking firm of Wemple Bros. in the sum of \$1000, for which he gave a note drawing interest at the rate of six per cent per annum. Defendants, G. W. McDevitt and W. S. Mitchell, signed the note as security. To further secure the note, said Maginn and wife executed to Wemple Bros. an instrument in writing, reciting that "they, the said first parties, do by these presents assign, set over, transfer, ratify and confirm unto the said second parties [Wemple Bros.] all the estate, right, title, claim, demand and interest, whether in possession or expectancy, both legal and equitable, of them in and to the following described real estate," (describing the land owned by Maria A. Maginn at the time of her death,) to secure the payment of said \$1000 note, describing it. The said instrument concludes: "Now, if the said Fred Maginn pays the said note on or before maturity then this assignment becomes null and void and of no effect, otherwise to remain in full force and effect." The note and said instrument to secure it were executed May 4, 1911. Maginn did not pay the note but it was paid by McDevitt and Mitchell, the sureties, and they took an assignment of the note and said written instrument from Wemple Bros. John F. Maginn died intestate February 14, 1912, leaving a widow and seven children, six of whom are minors. At the time of the death of Maria A. Maginn there was a mortgage on the 80 acres she owned for \$3900, and a mortgage on the 120 acres given by her and Charles C. Maginn to secure a loan of \$4500. Charles C. Maginn, as executor and trustee, took charge of the land



under authority of the will, and from the proceeds received therefrom had paid, before the bill in this case was filed, all but \$1600 of the \$3900 mortgage and all but \$500 of the \$4500. The ten-year period during which the land was to remain in the possession and control of the executor and trustee before it was authorized to be sold and the proceeds distributed did not expire until November 14, 1914.

The bill in this case was filed to the term of court which began November 9, 1914. The bill alleged that the adult surviving heirs of Maria A. Maginn had requested the complainant, as executor and trustee, to sell the land immediately after the expiration of the ten-year period; that because the complainant owned the undivided one-half of the 120 acres and was the sole owner of land on both the east and west sides thereof, there was some conflict between his private interest and his duty as executor and trustee, and he desired to protect his own interests and was not in a proper position to sell the land in the manner contemplated by the will. The bill further alleged that at the time John F. Maginn executed the pretended mortgage or assignment to Wemple Bros. he was not seized of any estate in the land and that said instrument was without effect and void; that because of the conflict between the private interests of complainant and his obligations as trustee he should not make the sale of the land belonging to the estate of Maria A. Maginn, as provided by her will, but that the sale should be made by some disinterested person appointed by the court; that sale be made of the entire 120 acres, including the undivided one-half of complainant, and the whole of the 80-acre tract. The bill prayed that the 80 acres owned solely by Maria A. Maginn be sold subsequent to November 14, 1914, by a competent person appointed by the court for that purpose, and the proceeds, after paying the incumbrance, costs and charges of this suit, be paid, one-fifth to each of the surviving children of Maria A. Maginn and one-thirty-fifth to each of the children of John F. Maginn,

deceased. Partition of the 120 acres was asked in accordance with the rights and interests of parties as set out in the bill, and in the event the same could not be partitioned, that the land be sold by and under the direction of the court, and that the proceeds be distributed, after paying the incumbrance, costs and charges, to the parties entitled thereto as alleged in the bill.

McDevitt and Mitchell answered, denying the allegation that John F. Maginn was not seized of any estate in the lands, and averring that he was seized of an estate therein which he mortgaged to secure a \$1000 note, and that the note and mortgage had been assigned to the respondents and was due and unpaid. They also filed a cross-bill, in which they set up the execution of the note to Wemple Bros. by John F. Maginn and alleged he executed a mortgage on his undivided interest in the land to secure the same, and that the note and mortgage were assigned to and now held by cross-complainants. The cross-bill prayed that an account be taken of the amount due on the note and mortgage; that the executor and widow and children of John F. Maginn be decreed to pay the same, and that in default of such payment the mortgaged premises be sold to satisfy the debt and costs.

Charles C. Maginn, individually and as executor and trustee, answered the cross-bill, denying John F. Maginn owned any interest in the land and alleging that the purported mortgage or assignment was void and of no effect. George L. Merrill was appointed guardian *ad litem* for the minor defendants and filed a formal answer on their behalf. Mary J. Nipper, Elizabeth A. Carson, Ida M. Schramm and the other adult defendants entered their appearances in writing but filed no answers. Default was taken against all adult defendants not answering.

The cause was referred to the master in chancery, who heard the testimony and reported his conclusions that John F. Maginn had no vested interest in the real estate he mort-

gaged to Wemple Bros. and that said mortgage or agreement is not a valid lien upon any part of the real estate described therein. He recommended a decree dismissing the cross-bill and granting the relief prayed in the original bill. Exceptions to the master's report by McDevitt and Mitchell were overruled and a decree entered as prayed in the bill. The decree finds that the adult heirs of Maria A. Maginn have requested the complainant, as executor and trustee, to sell the land as provided in the will, but that on account of his owning the undivided one-half of part of the land and his being the sole owner of adjoining land on two sides of it he should not make the sale, and that because of the conflict of his private interests and his official duties the land should be sold by the master in chancery, including the undivided one-half of the 120 acres owned by complainant, in accordance with his desire that the same should be sold. The decree finds John F. Maginn owned no interest in the land and that the assignment or agreement executed by him to Wemple Bros. was not a lien upon any of said real estate or the proceeds thereof. The decree orders all the land to be sold by the master in chancery, acting as trustee, at public auction to the highest and best bidder, and after paying the costs and expenses and the balance found to be due on the mortgages, that the proceeds be distributed, one-fifth to each of the four surviving adult children and one-fifth to the children of John F. Maginn, deceased. McDevitt and Mitchell have prosecuted this appeal from that decree.

Appellants insist (1) that the will gave the executor no estate or interest in the land but gave him only the management and control of it for ten years, with a contingent power of sale at the expiration of that period; (2) that the power of sale being conditional and not absolute, the will did not affect an equitable conversion of the land into personal property, and the heirs of the testatrix took title to the land subject to its being divested by sale at the time

and in accordance with the terms of the power; (3) that there was no such request of the heirs at the end of the ten-year period as to authorize a sale, and the power to sell became a nullity.

We do not agree with appellants' construction of the will. In our opinion under a correct construction of it the decree was in harmony with the authorities. That the testatrix contemplated and intended that a sale should be made and that the power to sell it was not dependent upon the heirs requesting it, we think clearly appears from a consideration of the whole will. The object of making the will was that the testatrix might make such different disposition of her land from that which the law would make in case of intestacy as she desired. She evidenced by her will her intention that the children should not take the land. Her desire was that they should have instead the proceeds of its sale. The land was incumbered, and she did not wish it sold subject to the incumbrances but wanted the incumbrances paid out of the rents and profits of the land. She therefore placed it in the possession and management of her executor for ten years, with direction, at the request of the heirs, to sell it at the expiration of that time. The request of the heirs was not intended as a condition precedent to the exercise of the power. The power to sell was necessary to carry out the intention of the testatrix and the trustee was authorized to make the sale when the time arrived, and if he did not do so the heirs could require him to make the sale. To hold the testatrix did not intend the land to be sold unless all of the heirs requested it would be to say she intended to put it in the power of any one of her heirs to defeat her will and the disposition she had made of her property. The fact that she made no disposition of the property in the event no sale was made shows she considered the disposition made of her land final and that it must be sold to carry out her intention. The power of sale being absolute and not conditional or discretionary, the will

operated as an equitable conversion of the land into personal property, and the children of Maria A. Maginn took no interest in the land. *In re Corrington*, 124 Ill. 363; *Howard v. Peavey*, 128 id. 430; *Darst v. Swearingen*, 224 id. 229, and cases there cited.

It follows, therefore, that the mortgage or assignment given by John F. Maginn conveyed no interest and created no lien against the land. Neither could it operate as an assignment of an interest in the proceeds of the sale when the period of distribution arrived. The will directed that the proceeds of the sale be distributed equally to the children of the testatrix, (naming them,) "if they then all be living, but in case any of my above named children shall depart this life before that time," to the survivors if the deceased child left no children and to the children of such deceased child if any such survive. Until the time for distribution arrived it could not be determined who would be entitled to the proceeds, and until that time the interest was contingent. (*Hull v. Ensinger*, 257 Ill. 160; *Barnes v. Johnston*, 233 id. 620; *Brechbeller v. Wilson*, 228 id. 502.) John F. Maginn died before the period for distribution arrived, hence never had any vested interest in the proceeds of the sale. He had no interest either in the land or the proceeds of its sale, and could not, therefore, make any valid conveyance or assignment of any interest.

Other questions are discussed in the briefs, but as the only parties complaining of this decree are the appellants, whose interest depends upon the validity of the instrument executed by John F. Maginn to Wemple Bros., and as we have held it is not a lien on the land or the proceeds of its sale and gives the holders no right in the estate and property of Maria A. Maginn, we deem it unnecessary to discuss questions not affecting in any way any right of appellants.

The decree of the circuit court is affirmed.

*Decree affirmed.*

THE PEOPLE *ex rel.* Maclay Hoyne, State's Attorney, Petitioner, *vs.* AUGUST LUEDERS *et al.* Respondents.

*Opinion filed October 27, 1915.*

1. ELECTIONS—*production of ballots for inspection of grand jury is not a violation of the secrecy of the ballot.* Requiring the production of ballots for inspection by the grand jury which is investigating alleged fraud in the election is not a violation of the secrecy of the ballot, within the meaning of the constitution and the statutes.

2. SAME—*court may require production of ballots where a violation of the City Elections act is charged.* The fact that the proviso to section 27 of the Ballot act of 1891 merely authorizes the opening of ballots in case of an election contest does not preclude the production of the ballots for inspection by the grand jury which is investigating an alleged violation of section 5 of the City Elections act as amended in 1899.

3. SAME—*power of the court to impound ballots.* While ballots should not be taken from the custody of the proper custodian during the time allowed for an election contest or pending such contest, yet after the expiration of such time or the final determination of the contest the court may, in its discretion, impound the ballots for use as evidence in any criminal prosecution pending in which such ballots are material as evidence.

ORIGINAL petition for *mandamus*.

MACLAY HOYNE, State's Attorney, (HENRY A. BERGER, of counsel,) for petitioner.

CHARLES H. MITCHELL, and COLIN C. H. FYFFE, for respondents.

Mr. JUSTICE COOKE delivered the opinion of the court:

At the June term, 1915, this petition for the writ of *mandamus* was filed by leave of court against the respondents, August Lueders, Anthony Czarnecki and Frank X. Rydzewski, members of the board of election commissioners of the city of Chicago, praying that they be commanded forthwith to produce before the grand jury of Cook county

all the ballots cast in the fifth precinct of the fifth ward in the city of Chicago at the election held on April 6, 1915, in said city of Chicago. The respondents having filed a general demurrer to the petition, the cause has been submitted for decision on the demurrer.

The petition alleges that at the February term of the criminal court of Cook county the grand jury was empaneled, and on May 6, 1915, there was pending before it a hearing to determine the making of a presentment against any and all persons against whom there was evidence of violation of the election laws occurring in the fifth precinct of the fifth ward in the city of Chicago at the election held April 6, 1915; that the board of election commissioners of the city of Chicago have the custody and possession of the ballots cast, as in all elections in the city of Chicago, and are required to retain such custody and possession for a period of six months next ensuing the election, at which time the law requires the destruction of the ballots if no election contest involving them is pending; that the respondents were each of them members of the board of election commissioners on May 6, 1915, and had on that day the custody and possession of all the ballots cast in said precinct and each and all of the tally-sheets and tally-books made and kept by the judges and clerks of election; that a *subpoena duces tecum* was served upon each of the respondents to produce on May 6, 1915, before the grand jury, the tally-sheets and tally-books of said precinct and all the ballots cast in said precinct at said election; that respondents appeared before the grand jury in response to said subpoena and produced the tally-sheets and tally-books but refused to produce the ballots that were cast in said precinct at said election; that it appears from evidence already produced and heard by the grand jury that there were cast in said precinct more ballots than shown by the tally-sheets and tally-books to have been voted for certain candidates, and that there were cast less ballots than shown

by the tally-sheets and tally-books for certain candidates at said election; that the making and keeping of the tally-sheets and tally-books in this manner constitute a crime under the election laws, and that the ballots cast and voted in said precinct at said election are necessary as evidence before the grand jury for its examination to complete its determination as to the making of a presentment against such person or persons guilty of violating the election laws.

Respondents make two contentions: First, that the production of the ballots for the inspection of the grand jury violates the secrecy of the ballot required by both the constitution and the statute; and second, that the statute itself prohibits the production of the ballots for such a purpose.

In support of the first contention it is urged that the effect of the provision of section 2 of article 7 of the constitution that all votes shall be by ballot is that the votes shall be secret, and it is pointed out that under the Ballot act of 1891 extreme care was taken by the General Assembly to provide for absolute secrecy of the ballot. There can be no question of the correctness of the contention of the respondents that it was the design of the General Assembly that the ballot should be secret and that every possible means has been provided to obtain and preserve such secrecy. The respondents have, however, in our judgment, misapprehended the purpose of some of the provisions of the Election act, and attribute to various provisions made to preserve the integrity of the ballot an intent also to preserve secrecy. The provisions for the secrecy of the ballot all apply to the preparation and casting of the ballot. The act makes no provision for secrecy after the ballot has been deposited in the ballot-box. If the law has been strictly complied with, it would be impossible to determine by whom any particular ballot had been cast. Were it otherwise, then the secrecy of the ballot would be to an extent destroyed when the judges of election inspect the ballots for the purpose of counting the votes.



Counsel for the respondents call particular attention to section 27 of the Ballot act of 1891, which is as follows: "When the canvass of the ballots shall have been completed, as now provided by law, the clerks shall announce to the judges the total number of votes received by each candidate; each judge of the election shall proclaim in a loud voice the total number of votes received by each of the persons voted for and the office for which he is designated, and the number of votes for and the number of votes against any proposition which shall have been submitted to a vote of the people; such proclamation shall be *prima facie* evidence of the result of such canvass of the ballots. Immediately after making such proclamation, and before separating, the judges shall fold in two folds, and string closely upon a single piece of flexible wire, all ballots which have been counted by them, except those marked 'objected to,' unite the ends of such wire in a firm knot, seal the knot in such manner that it cannot be untied without breaking the seal, enclose the ballots so strung in a secure canvas covering and securely tie and seal such canvas covering with official wax impression seals to be provided by the judges, in such manner that it cannot be opened without breaking the seals, and return said ballots, together with the package containing the ballots marked 'defective' or 'objected to,' in such sealed canvas covering to the proper clerk or to the board of election commissioners, as the case may be, and such officer shall carefully preserve said ballots for six months, at the expiration of that time shall destroy them by burning without previously opening the packages. Such ballots shall be destroyed in the presence of the official custodian thereof and two electors of approved integrity and good repute and members respectively of the two leading political parties. The said electors shall be designated by the county judge of the county in which such ballots are kept: *Provided*, that if any contest of the election of any officer voted for at such election

shall be pending at the expiration of said time the said ballots shall not be destroyed until such contest is finally determined. In all cases of contested elections the parties contesting the same shall have the right to have said ballots opened and to have all errors of the judges in counting or refusing to count any ballot, corrected by the court or body trying such contest, but such ballots shall be opened only in open court or in open session of such body and in the presence of the officer having the custody thereof." (Hurd's Stat. 1913, p. 1125.)

By this section careful provision is made for the preservation of the ballots after they have been counted. This provision is necessary in order that in the event of a contest the ballots shall be presented to the court or body having charge of the contest in the condition they were when cast and counted at the election. Nothing contained in this section can be said to be intended to prevent it becoming known how any particular person voted. The secrecy of the ballot is preserved by this section to the extent that it prevents the ballots being again opened and inspected after the canvass has been completed except in the cases provided for by the Election act.

In support of their second contention respondents rely upon that part of said section 27 which provides for the destruction of the ballots, unopened, at the expiration of six months after the election, provided that in case of a contest the parties to the contest shall have the right to have the ballots opened and re-counted, and the ballots shall not be destroyed until the contest is finally determined. It is contended that the provision allowing the ballots to be opened and re-counted in election contests is an express exception to the provision requiring the destruction of the ballots, unopened, at the expiration of six months after the election, and that all other exceptions are necessarily excluded. It will be noted that while this exception appears by way of proviso, the section does not provide that in no

event except in case of an election contest shall the ballots be opened and examined. The legislature has the undoubted right to provide that the ballots shall not be opened and inspected for any other purpose, and if it has done so then they cannot be produced as evidence before the court or grand jury and the writ must be denied.

The city of Chicago has adopted the provisions of the act of 1885 regulating the holding of elections and declaring the result thereof in cities, villages and incorporated towns, and is operating under that act. The City Election act, as the act of 1885 is generally known, has been repeatedly amended, and in 1899 the whole act was amended and revised and thus re-enacted. The City Election act and the Ballot act of 1891 must be construed together in reference to the holding of elections in cities, villages and incorporated towns which have adopted the provisions of the City Election act. Section 5 of article 6 of the City Election act is as follows:

"Sec. 5. Every judge of election, member of any board of canvassers, messenger, poll clerk or other officer authorized to take part in, or perform any duty in relation to any canvass or official statement of the votes cast at any election in any precinct, or in any city, village or incorporated town, who shall willfully make any false canvass of said votes;

"Or shall make, sign, publish or deliver any false return of such election, or any false certificate or statement of the result of such election, knowing the same to be false;

"Or who shall willfully deface, destroy or conceal any statement, tally or certificate entrusted to his care or custody;

"Shall, on conviction thereof, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than five nor more than ten years." (Hurd's Stat. 1913, p. 1109.)

This section was incorporated in the original act of 1885 and was re-enacted in the revision of the act in 1899. The intent of the legislature to provide punishment for the making of a false return of an election is clear and unmistakable. It is apparent that the ballots themselves would always constitute the best, and in many cases the only, evidence of the commission of an offense created by said section 5. Before it can be held that the General Assembly intended to prohibit the production of the ballots to be used as evidence in such cases such intent must clearly appear. If the exception contained in said section 27 of the Ballot act of 1891 has the effect contended for, then it is in conflict with said section 5 of article 6 of the City Election act and must give way to the provisions of the latter section, as it is the later enactment. (*Johnson v. County of Winnebago*, 256 Ill. 276.) It would be absurd to hold that it was not the intent of the City Election act that the highest and best evidence should be used in prosecutions under said section 5 of article 6. That being true, it is evident that the exception contained in said section 27 was either not intended to be exclusive of all others or must give way to the provisions of the City Election act.

The court has the power to require the custodian of the ballots to produce them for the inspection of the grand jury and to be used as evidence on the trial before the court in case of indictment. The provisions of said section 27 for the preservation of the integrity of the ballots should be observed, however, and the ballots should not be taken from the custody of the proper custodian during the time in which a contest of an election might be instituted or during the time an election contest is pending which involves the ballots in question. After the expiration of the time for instituting a contest, if no contest has been brought, and after the final determination of a contest where one has been instituted, the court may, in its discretion, impound the ballots for use as evidence in any crimi-

nal prosecution pending in which such ballots are material as evidence.

The demurrer is overruled and the writ of *mandamus* is awarded commanding respondents to produce the ballots as prayed in the petition, but the ballots shall not be taken from the custody of respondents while being used as evidence, either before the grand jury or in open court.

*Writ awarded.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, *vs.*  
THE UNION ELEVATED RAILROAD COMPANY, Appellee.

*Opinion filed October 27, 1915.*

1. *QUO WARRANTO*—*power of court to vacate leave to file information.* Where leave to file an information in the nature of *quo warranto* is granted in an *ex parte* proceeding, the court may, at any time during the term at which such leave was granted, vacate and set aside the order if it is made to appear that the leave was inadvertently or improvidently granted or allowed under a misapprehension of the law or the facts.

2. *SAME*—*discretion in granting leave and setting aside order is subject to review.* The discretion of the trial court in the matter of granting leave to file an information in the nature of *quo warranto* and in setting aside such order on motion made during the term is not arbitrary but is a sound judicial discretion, resting upon established principles of law, and is subject to review.

3. *SAME*—*leave to file information is required in all cases.* Under section 1 of the *Quo Warranto* act leave to file an information in the nature of *quo warranto* is required in all cases, and is to be granted when "the judge shall be satisfied that there is probable ground for the proceeding."

4. *SAME*—*what is meant by words "probable ground," as used in the Quo Warranto act.* The words "probable ground," as used in section 1 of the *Quo Warranto* act with reference to granting leave to file an information in the nature of *quo warranto*, mean a reasonable ground of presumption that the charge is or may be well founded.

5. *SAME*—*when granting leave to file an information is proper.* Leave to file an information in the nature of *quo warranto* asking judgment of ouster against a corporation is properly granted where

the allegations of the petition show reasonable ground for believing that the corporation has abused its corporate rights and privileges, not only by making a fraudulent and fictitious issue of its capital stock and bonds and increasing its indebtedness with intent to evade the constitution and laws of the State, but also by failing, for more than ten years, to exercise any of its corporate functions, powers, privileges or rights.

6. SAME—*when order granting leave to file information should not be set aside.* If a petition for leave to file an information in the nature of *quo warranto* shows probable ground for granting the leave, and leave is granted, the order granting such leave should not be set aside upon motion supported by affidavits which amount merely to a denial of the allegations of fact in the petition and of fraudulent intent to evade the law, but the proper practice in such case is to deny the motion and require the respondent to demur or plead to the information, as it sees fit.

7. SAME—*when objection that information is based on matters not in the petition is not before a court of review.* Section 4 of the Quo Warranto act points out the manner in which defects or imperfections in an information may be taken advantage of, and until that method has been pursued and the sufficiency of the information passed upon by the lower court, an objection that the information is based upon matters not set up in the petition for leave is not before a court of review.

8. SAME—*when laches cannot be imputed to State—exceptions.* Laches in the filing of an information in the nature of *quo warranto* cannot be imputed to the State except where there is a mere defect in the formal organization of a corporation, acquiesced in by the State, or where the proceeding is for the benefit of a private relator, or where the legality of the organization of a municipality is questioned and injury to the public may result from assertion of the rights of the State.

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

This was a petition for leave to file an information in the nature of *quo warranto* by the State's attorney of Cook county against the Union Elevated Railroad Company (hereinafter called the Union Elevated Company) to procure a forfeiture of its corporate franchise and privileges for alleged violations of its charter rights and the constitution and laws of this State. At the time the peti-

tion in question was filed a similar petition was presented against the Union Consolidated Elevated Railway Company, (hereinafter called the Consolidated Company,) and like proceedings were had on both petitions, so that it has been stipulated that but one brief should be filed for both cases. The court granted the prayer of the petition and allowed the informations to be filed, but subsequently, on the motion of respondents, vacated and set aside the order granting such leave and dismissed the petition. This appeal followed.

As both cases involve the same questions they will be considered together and disposed of in one opinion, but a separate order will be entered in each case.

It appears from the record and proceedings in this case that in July, 1913, the State's attorney of Cook county presented his petition for leave to file informations in the nature of *quo warranto* against these two corporations, which was allowed and the informations filed, and that the order granting leave was subsequently vacated and set aside and the petition dismissed without prejudice to the right of the State's attorney, at any time thereafter, to present another petition against the respondents. From this order the People prosecuted an appeal to this court, which affirmed the judgment of the lower court in *People v. Union Consolidated Elevated Railway Co.* 263 Ill. 32, where the reasons for our decision and our views as to the principles of law involved on the questions then before the court are fully set forth and need not be re-stated here, in so far as this case involves similar questions of law. After the decision was rendered in the former case, and on May 27, 1914, the State's attorney of Cook county presented the petitions in this case to one of the judges of the circuit court of that county, in one of which petitions the Union Consolidated Company and in the other the Union Elevated Company were made sole defendants. Upon the presentation of the petitions leave was granted, the informations

were filed and process ordered issued. On June 2, 1914, and at the same term at which the leave was granted, the respondents entered special and limited appearances in each case and moved the court to vacate the orders granting leave to file the informations and to dismiss the petitions, supporting the motions in each case by affidavits. A hearing was had on these motions on June 26, 1914, and the court announced the motions would be allowed, but no order was entered at the time as the State's attorney requested ten days' time in which to file counter-affidavits and to apply for a rehearing. On July 6, 1914, counter-affidavits were filed in each case and a final hearing was had, at the conclusion of which the court entered the orders vacating the orders formerly entered granting leave to file the informations and for process, abated the proceedings and dismissed the petitions in each case. As the petitions and affidavits in each case are similar and the questions involved in each case are the same, the substance of those filed in but one of the cases (the Union Elevated Company case) will be stated.

It is alleged in the petition filed in the Union Elevated Company case that the latter company was organized in November, 1894, under the law of this State known as the Railroad Incorporation law, with a capital stock of \$5,000,000, divided into 50,000 shares of the par value of \$100 each; that the company issued and now has outstanding all of its capital stock, of the par value of \$5,000,000, and that it also issued and now has outstanding bonds of the par value of \$5,000,000, and that its entire capital stock of \$5,000,000 and bonds to the amount of \$4,387,000 were issued to the Loop Construction Company (hereinafter called the Loop Company) for the purpose of procuring the right of way and constructing and equipping the elevated railways of the Union Elevated Company; that the actual cost of procuring such right of way and con-



structing and equipping the said railways did not exceed \$2,277,551.

The petition further alleges that during the years 1911 and 1912 the city council of the city of Chicago, at the request of the Union Elevated Company and other elevated railways in the city of Chicago, appointed a committee for the purpose of making a report on the valuation of the elevated railroad properties in the city of Chicago, including those of respondent, and that on May 8, 1913, the committee made its report, based upon what it would cost to reproduce the same as of January 1, 1912, and that the cost of reproducing such properties, including the equipment and right of way of the Union Elevated Company as of that date, did not exceed \$2,277,551; that the actual cost of procuring the right of way and constructing and equipping the Union Elevated Company did not exceed the estimated cost of reproducing the same as of January 1, 1912, as found by said valuation committee, and that in an official report made by the Union Elevated Company to the New York Stock Exchange, made for the purpose of having its bonds listed on that exchange, its officials stated "the cost of the road equipment, right of way and construction, including power house equipment, was \$3,925,000,"—an amount greatly in excess of the true cost of the right of way, power house, construction and equipment of such railway.

The petition further alleges that Charles T. Yerkes was president of the Union Elevated Company at the time of its construction and in 1898 and 1899, and that the Loop Company was organized by him, and his associates acting under his control, to build the Union Elevated railroad; that at that time there was in existence a company known as the Columbia Construction Company, created and controlled by Yerkes and his associates for the purpose of constructing and equipping the Northwestern Elevated railroad, and another company, known as the West Side

Construction Company, created for the purpose of constructing and equipping the railways of the Metropolitan West Side Elevated Railroad Company and of the Union Consolidated Company; that \$5,000,000 of the par value capital stock of the Union Elevated Company was issued and delivered to the Loop Company without any actual consideration whatever or receiving any money, labor or property in payment of the same, and that the entire cost of building and equipping the railroad, including reasonable profits, overhead expenses, legal expenses, cost of right of way, construction and equipment, and other reasonable costs and charges, was paid by the Loop Company out of the proceeds of the sale of the bonds of the Union Elevated Company, and that, in fact, neither the Union Elevated Company nor the Loop Company received any money, labor or property as consideration for the issuance of the \$5,000,000 capital stock given the Loop Company, but that \$2,000,000 of the par value of said stock was given by the Loop Company to the West Side Construction Company and by it distributed to its stockholders as a bonus, and that \$450,000 of the capital stock of the Union Elevated Company, of the par value of \$450,000, was given by the Loop Company to the Columbia Construction Company and by it distributed as a bonus to its stockholders, and that \$2,550,000 of the par value of the capital stock of the Union Elevated Company was delivered by the Loop Company to Yerkes and his associates, who were stockholders in the Loop Company; that in December, 1895, the Columbia Construction Company, in floating an issue of its stock, offered a bonus of fifteen per cent, and subsequently of forty per cent, in stock of the Union Elevated Company, and that the president of the Columbia Construction Company, who subsequently became general manager of the Union Elevated Company and was one of Yerkes' associates and accomplices in financing these properties, issued a public statement to the stockholders of the Colum-

bia Construction Company, stating that the offering of the Union Loop stock was "a pure gratuity; that the Columbia Construction Company stockholders had taken no risk whatsoever and were in nowise involved in the Union Loop enterprise."

The petition further alleges that the Union Elevated Company claims the \$5,000,000 of its capital stock and the \$4,387,000 of bonds were issued to the Loop Company in payment for the property received, and charges that the entire payment for the property received was made out of the proceeds of the bonds issued, and that the delivery to the said construction company of stock and bonds in the amount of \$9,387,000, par value, in payment for property received, which actually cost not to exceed \$2,277,551, was a mere trick or device conceived with the fraudulent intent to evade the constitutional and statutory requirements that no railroad corporation shall issue any stock or bonds except for money, labor or property actually received and applied to the purpose for which such corporation was organized, and that all dividends and other fictitious increase of the capital stock or indebtedness of such corporation shall be void, and that the same constituted a fraud upon the People of the State of Illinois, and was a mere trick or device conceived with fraudulent intent to evade said constitutional and statutory provisions by a reckless and dishonest issue of stock and bonds grossly in excess of the consideration received therefor; that the Union Elevated Company issued and placed upon the market stocks representing nothing of substantial value and bonds grossly in excess of the value of the money, labor and property received as the consideration therefor, and that through the organization and operations of the Loop Company, the Columbia Construction Company and the West Side Construction Company, and through the organization and manipulations of the securities of the Union Elevated Company, the Consolidated Company and other

companies, said Yerkes and his associates issued, transferred and manipulated the securities of the Union Elevated Company so that the said securities, or the portions thereof which represented nothing of substantial value and no money, labor or property actually received therefor and applied to the purpose for which the corporation was organized, should become a charge upon said railroad companies, which said scheme, device and manipulations were for the purpose of evading and violating the provisions of the constitution and statute above set forth and constituted a fraud upon the People of the State of Illinois; that in the consummation of said fraudulent transaction and scheme the Northwestern Elevated Railroad Company, a corporation organized under the Railroad Incorporation statute and operating in Cook county, Illinois, in 1901 purchased the capital stock of the Union Elevated Company from the then holders thereof for \$125 cash per share, and thereafter caused to be certified and delivered to it the remaining \$613,000 of first mortgage bonds of the Union Elevated Company; that of these bonds 95 were sold for cash at par or over, 43 were issued in exchange for an equal number of bonds of the Lake Street Elevated Railroad Company alleged to be of equal value, and 315 were pledged by the Northwestern Elevated Railroad Company as collateral for its notes, and the remaining 160 are still in the treasury of the Northwestern Elevated Railroad Company; that in the issuance of said \$613,000 first mortgage bonds the Union Elevated Company received no consideration whatsoever in money, labor or property and that the issuance of the same was and is a fraud upon the People of the State of Illinois, and the same was done with a fraudulent intent and the same was and is a fictitious increase of the indebtedness of the corporation, in violation of the constitution and statutes above set forth.

The petition further shows that in 1901 the Union Elevated Company sold and transferred to the Northwestern

Elevated Railroad Company all of its property and since that time has owned no property and done no business, and avers that such sale of its property and cessation of business was and is a surrender and forfeiture of its franchise, rights and privileges as a corporation, and that the wrongful and fraudulent issue of capital stock and bonds was contrary to the constitution and provisions of the statutes of the State of Illinois as above set forth, and that in the misuse and abuse of its powers as a corporation the corporation has usurped, and still doth usurp, its franchises and privileges and exercises powers not conferred upon it by law, and that in the creation of a fictitious capital stock and bonded indebtedness as a basis for charging extortionate rates which the corporation has charged for the transportation of passengers and in the doing of acts which amount to a surrender or forfeiture of its rights and privileges as a corporation has rendered itself liable to judgment of ouster, and prays that the court may enter an order that the information in the nature of *quo warranto* may be filed and that process issue.

The information filed contained four counts. The first count is based on a violation of section 13 of article 11 of the constitution of 1870 and section 21 of chapter 114 of the Revised Statutes of this State by the Union Elevated Company in issuing and delivering to the Loop Company \$5,000,000, par value, of its capital stock without any consideration and without receiving anything of value therefor, to be applied to the purposes for which the Union Elevated Company was created, and the issuance and deliverance to the Loop Company of \$4,387,000, par value, of its bonds in payment for the procuring of the right of way, construction and equipment of the Union Elevated Company's railway lines, the actual cost of procuring such right of way, construction and equipment not exceeding \$2,277,551. The second count is based upon the sale of all of the stock of the Union Elevated Company to the

Northwestern Elevated Railroad Company and the certifying and delivering to it of \$613,000, par value, of its bonds without receiving any consideration whatever therefor in money, labor or property. The third count is based upon the sale and transfer, in 1901, by the Union Elevated Company of all of its property, including its railroads, power house and other equipment, to the Northwestern Elevated Railroad Company, since which time it has owned no property and done no business in the exercise of its franchises, licenses and privileges as a corporation. The fourth count is based upon the failure and omission of the Union Elevated Company for the past ten years to operate its railroads within the city of Chicago, as required by its charter, or to perform its corporate functions as such corporation.

The substance of the grounds set forth in the motion to vacate the order granting leave to file the information is, that no notice of the application for leave to file the information was given and that no probable grounds were shown for granting leave to file the information. Two affidavits were filed in support of this motion,—one by the secretary of the Union Elevated Company which sets forth that more than ninety per cent of the stock of that corporation outstanding has been retired and is now held as a muniment of title by the Northwestern Elevated Railroad Company, which in 1901 acquired the property, franchises, rights and privileges of the Union Elevated Company; that commencing with the year 1897 and ending with the year 1901 it filed its annual report with the Illinois Railroad and Warehouse Commission, in which it set forth that all of its capital stock, together with all such of its bonds as were outstanding, had been issued on account of the cost of the construction of its railroad; that since 1901 it has not filed, or been required to file, any report by reason of the sale for \$6,250,000 in cash, of its property, franchises and rights to the Northwestern Elevated Railroad Company,

which owned and operated an elevated railroad that connected with the Union Elevated Company's road, which company also assumed and agreed to pay the outstanding bonds and all other liabilities of the Union Elevated Company, the deeds and other instruments in writing evidencing such sale and transfer being duly filed in the recorder's office of Cook county and in the office of the Secretary of State of Illinois at the time of the transfer, authenticated certificates setting forth the resolution of the stockholders of the Union Elevated Company authorizing the sale and transfer and the resolution of the Northwestern Elevated Railroad Company authorizing the purchase being filed with the Secretary of State and also in the office of the recorder of deeds of Cook county; that the \$6,250,000 was paid by the Northwestern Elevated Railroad Company and deposited in bank and paid out and distributed to the stockholders of the Union Elevated Company at the rate of \$125 per share, more than ninety per cent of the amount of the stock being surrendered indorsed in blank, the certificates so surrendered being delivered to the Northwestern Company to be held by it as muniments of title, only; that the said stock is of no value, and that the delivering of the certificates to the Northwestern Elevated Railroad Company was, in substance and effect, a retirement of such stock and always has been so considered by such company and its officers; that in 1902 the Northwestern Elevated Railroad Company filed with the Railroad and Warehouse Commission its annual report, setting forth that it had purchased and acquired all the rights, privileges, franchises and property of the Union Elevated Company and held the same as a part of its railroad lines and systems, and ever since that time has filed like reports, and has included the property in its annual report made to the State Auditor, and has paid all taxes and assessments levied against the property as the property of the Northwestern Elevated Railroad Company. Said affidavit further sets forth that

at the time of the purchase of the property and franchise of the Union Elevated Company it held 613 of the bonds of that company that had been deposited in escrow under an arrangement by which the bonds were subject to withdrawal by the Union Elevated Company for its own use, to reimburse it for certain expenditures that might be incurred incident to the construction of its railroad; that all of the bonds were withdrawn from escrow by the Northwestern Elevated Railroad Company; that 90 of these bonds sold for more than par, 43 were exchanged for other bonds of equal value, and of the 475 still belonging to the Northwestern Elevated Railroad Company 389 are pledged as collateral security for loans made by that company. The other affidavit was by a member of an engineering firm whose business was to make valuations of railroad properties, and stated that in making the valuation of the Union Elevated Company's properties no valuation was made of its franchise or rights under city ordinances or of the promotion expenses, brokerage, construction, equipment and claims for damages, which in his judgment would aggregate not less than \$2,297,000, and that adding these to the valuation as made by the commission would make the total valuation of the property \$4,574,551.

Counter-affidavits of the mayor of the city of Chicago and the State's attorney of Cook county were filed, from which it appears that during the time from 1906 to 1910 the surface street railways in the city of Chicago obtained new grants for the operation of their lines, and as a basis of obtaining such grants the amount of capitalization which such companies might issue and upon which their fixed charges should be based was determined by a valuation committee selected by these companies and the city of Chicago; that for three years negotiations had been under way looking towards the unification of all elevated railways and surface lines to be operated as a whole, with the object of offering the public universal transfers between



the surface and elevated systems for a single fare ride within the city, and that as a prerequisite to carrying into effect such arrangement the amount of capitalization upon which the elevated lines would be entitled to earn returns must be determined; that such negotiations were broken off in the year 1913, for the reason, among others, of the inability of the representatives of the city and of the companies to arrive at an agreement as to the amount of capitalization which should be recognized as a legitimate basis for the fixed charges of the elevated railroad companies; that thereupon the State's attorney made an investigation of the matter, and became convinced that it was his duty to institute proceedings against each of the elevated railway companies to ascertain the amount of money, labor and property actually received in consideration for their stock and bonds issued and applied to the purposes for which such corporations were created, and that in instituting and prosecuting this suit he is acting in his official capacity and under a sense of official duty for the protection of the interests of the People of the State of Illinois, and that no private interest had suggested or in any manner influenced him in instituting the proceedings.

P. J. LUCEY, Attorney General, and MACLAY HOYNE, State's Attorney, (GLENN E. PLUMB, and DONALD R. RICHBERG, of counsel,) for the People.

ISHAM, LINCOLN & BEALE, and HERRICK, ALLEN & MARTIN, (JOHN J. HERRICK, and GILBERT E. PORTER, of counsel,) for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The sufficiency of the petition originally filed by the State's attorney to show probable cause for the institution of the proceedings, and of the counter-affidavits filed in support of the motion to vacate such order for the purpose of showing that such leave was improvidently granted, are

the only questions presented by the assignment of errors for decision by this court.

The statute of this State commonly known as the Quo Warranto statute (Hurd's Stat. 1913, p. 1921,) provides in section 1 that upon certain conditions therein named the Attorney General or the State's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of *quo warranto* in the name of the People of the State of Illinois, and if such court or judge shall be satisfied that there is probable ground for the proceeding the court or judge may grant the petition and order the information to be filed and process to issue. This was the procedure followed in this case. A petition was presented, leave was granted to file the information, and the information was filed and process ordered issued. It is now insisted that no probable grounds were shown for so granting leave; that such leave was improvidently granted, and for that reason the order granting such leave was properly vacated and the proceedings abated upon the motion of respondent.

Where the preliminary proceedings on the hearing on the petition for leave to file the information are *ex parte*, the rule is well established in this State that whenever it is made to appear that leave to file such information has been inadvertently or improvidently granted or allowed under a misapprehension of the law or the facts, the court may, at any time during the term at which leave was granted, vacate and set aside the order granting such leave. (*People v. Union Consolidated Elevated Railway Co. supra*; *People v. Golden Rule*, 114 Ill. 34; *People v. People's Gas Light Co.* 205 id. 482; *People v. Darrough*, 266 id. 506.) And it is equally well settled that the discretion with which a court is vested in such matters is not a personal or arbitrary one but is a sound judicial discretion, resting upon

well established principles of law and subject to review. (*People v. Town of Thornton*, 186 Ill. 162; *People v. Mackey*, 255 id. 144.) With these settled principles in view, it is now the duty of this court to review the record of the lower court to ascertain, first, whether or not the petition showed probable ground for filing the information; and second, whether, after granting leave to file the information, the court abused its discretion in subsequently setting aside the previous order granting such leave.

At common law a writ of *quo warranto* was a writ of right for the crown and no leave was required for the Attorney General to file such information where only public rights were involved, but by section 1 of the Quo Warranto act of this State the common law rule has been abrogated, and now leave to file the information is required in all cases where the remedy is by an information in the nature of *quo warranto*. (*People v. Union Consolidated Elevated Railway Co. supra.*) Under our statute the application for leave to file the information is based upon a petition by the Attorney General or State's attorney of the proper county setting forth probable ground for the institution of the proceedings, but so far as we have been advised no case in this State has attempted to define or point out what will constitute "probable ground" for the proceeding, as those words are used in the present statute. This is undoubtedly due to the fact that a decision of the question rests largely upon the facts and circumstances of each particular case. The statute only requires that "the judge shall be satisfied that there is probable ground for the proceeding" before granting leave to file the information and ordering process to issue. Webster, in his International Dictionary, defines the word "probable" as meaning "capable of being proved," and says that the words "probable cause," in law, mean "a reasonable ground of presumption that a charge is or may be well founded." We think it was in this sense that the words were used in the present

statute. When the words are taken in this broad sense it will be seen that the petition need do no more than set up a state of facts, apparently true, sufficient to induce a reasonable belief that rights, privileges, franchises or offices are being usurped, intruded upon or unlawfully exercised by a person or corporation in violation of law, to the detriment of the public in the manner alleged. When such a condition is set forth it may well be said that probable ground for the institution of the proceedings is shown and that leave was properly granted and process ordered issued.

Without re-stating the more essential allegations of the petition filed in this case, we think it sufficient to say that the petition presented by the State's attorney clearly set forth probable ground for the institution of the proceedings. It alleges with all the certainty that could reasonably be expected under the circumstances, a violation of section 13 of article 11 of the constitution and of section 21 of chapter 114 of the Revised Statutes of this State by the issuance and delivery by the Union Elevated Company of \$5,000,000 in par value of its stock to the Loop Company without any consideration whatever, and by the issuance and delivery to the same corporation of \$4,387,000 of its bonds for the construction of a railroad which did not cost more than \$2,277,551 when fully constructed and equipped, and that these transactions were resorted to as a part of a fraudulent scheme or device to evade those constitutional and statutory provisions in making a dishonest and fictitious issue and increase of its capital stock and corporate indebtedness, and that after the transactions had been consummated the Union Elevated Company sold all of its property, rights, privileges and franchises to another corporation, and used substantially all of the purchase price of such property and franchises in redeeming at above par, or for \$125 per share, ninety per cent of the stock previously issued to the Loop Company without any consideration whatever, and that this corpo-

ration has ever since that time, and for more than the last ten years, not exercised any of its corporate functions, powers, privileges or rights. Failure to exercise its corporate powers alone constituted sufficient ground to authorize the institution of the proceedings. As said in *Edgar Collegiate Institute v. People*, 142 Ill. 363: "The rule is, that it is a tacit condition of the grant to be a corporation that the grantees shall act up to the end or design for which they were incorporated, and that hence, through neglect or abuse of its franchise, a corporation may forfeit its charter as for condition broken or for a breach of trust. (Angell & Ames on Corp. sec. 774, and cases cited in note 1; High on Extraordinary Remedies, sec. 666.) And our statute provides that proceedings in the nature of *quo warranto* may be prosecuted against a corporation where it 'does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation.' (Rev. Stat. 1874, sec. 1, chap. 112; 2 Starr & Curtiss, 1871.) It is true that 'where a misuser is relied upon as the foundation for proceedings to procure a forfeiture of the corporate franchise it must appear that there has been such a neglect or disregard of the corporate trust, or such a perversion of it to private purposes, as in some manner to lessen the utility of the corporation to those for whose benefit it was instituted or to work some public injury.'—High on Extraordinary Remedies, sec. 666."

If the allegations of the petition are true,—and they must be accepted as true for the purpose of determining the sufficiency of the petition,—we think it sets forth facts sufficient to show that there was reasonable ground for believing that the Union Elevated Company had neglected and abused its corporate rights, franchises and privileges, not only by making a fraudulent and fictitious issue of its capital stock and bonds and increasing its indebtedness with the intent of evading the constitution and laws of this State, but also by its failure to exercise and carry out

the objects and purposes for which it was chartered and created, and that the court did not err in granting leave to file the information.

As to the sufficiency of the showing that leave was improvidently granted, the counter-affidavits filed by respondent are in many respects merely contradictory of the allegations of the petition with respect to the consideration for which the stock of the Union Elevated Company to the amount of \$5,000,000 and bonds to the amount of \$4,387,000 were issued and delivered to the Loop Company and of the fraudulent intent of evading the statute and constitutional provisions of the State. Counter-affidavits simply denying the allegations of the petition are not sufficient to show that the leave was improvidently granted. They merely show that an issue should be made up for trial. In *Attorney General v. Chicago and Evanston Railroad Co.* 112 Ill. 520, a petition for leave to file an information in the nature of *quo warranto* was filed and a rule was entered on the respondent to show cause why leave should not be granted to file the information prayed for. The respondent showed cause by its answer and motion to discharge said rule. As stated in the opinion in that case (p. 535): "If the facts relied upon by the respondent in answer to the rule to show cause were disputed or if new and doubtful questions of law were presented that would require more time for their satisfactory solution than could reasonably be given to them on such an application, then, under the authorities referred to by the relator, (Buller's *Nisi Prius*, 210, Angell & Ames on Corp. secs. 740, 741, and *King v. Meiss*, 3 T. R. 596,) it would doubtless be the duty of the court to make the rule for an information absolute, 'that the questions might receive a full and final determination.' But the relator concedes that the facts relied upon by the respondent in his answer to the rule to show cause are not disputed, and we are of opinion that the questions of law presented may receive as full and

careful consideration on this application as could be given them were the rule to show cause made absolute." The affidavit of A. L. Drum, the engineering expert, as to what should be taken into consideration in fixing the value of the respondent's properties and the value of the same was largely a matter of opinion and concerned matters on which hardly any two witnesses would agree.

The other matters set up in the affidavits filed on behalf of respondent tended to show the People were guilty of *laches* in instituting this proceeding, and for that reason the order granting leave was properly vacated. This was not made one of the points in the motion to vacate the order granting leave, nor would it have constituted good ground for so doing had such question been raised. The rule is fundamental in this State that the Statute of Limitations does not run against the State, and by analogy that *laches* cannot be imputed to it. The rule in this respect is stated by Mr. Justice Breese in *People v. Brown*, 67 Ill. 435, as follows: "It is a familiar doctrine that the State is not embraced within the Statute of Limitations unless specially named, and by analogy would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard should this doctrine be applicable to a State. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government. The doctrine is well settled that no *laches* can be imputed to the government, and by the same reasoning which excuses it from *laches*, and on the same grounds, it should not be affected by the negligence, or even willfulness, of any one of its officials." This doctrine was affirmed in *People v. Pullman Car Co.* 175 Ill. 125, where in the majority opinion it is

said: "We have examined the various cases cited by counsel for appellee as in support of the defense of waiver and acquiescence in the case at bar, and do not find that in any of them the defense has been deemed available, as against the sovereign or State, except in case where the right and title of a corporation to corporate existence was questioned because of some defect in the original charter, irregularity in the proceedings for the organization of the corporation, or its failure to perform or fulfill some condition precedent to its legal organization. \* \* \* In the case at bar the appellee is conceded to be a corporation *de jure*, and the complaint is, it had assumed and exercised, and is assuming and exercising, powers not granted by its charter or implied by law." And to the same effect are the cases of *People v. Gary*, 196 Ill. 310, *People v. Burns*, 212 id. 227, *People v. Anderson*, 239 id. 266, *People v. Shedd*, 241 id. 155, *People v. Mackey*, *supra*, and *People v. Keigwin*, 256 Ill. 264.

To the above general rule, as pointed out by appellant, there are the three following exceptions, viz.: where there is a defect in the formal organization of a corporation, acquiesced in by the State; where the proceeding is for the benefit of a private relator; and where the legality of the organization of a municipality is questioned and injury to the public may result from assertion of the rights of the State. (*People v. Schnepf*, 179 Ill. 305; *People v. Rendleman*, 250 id. 289; *People v. Pullman Car Co. supra*.) The respondent is brought within neither exception by its counter-affidavits. In *People v. Golden Rule, supra*, it is said, on page 44 of the opinion: "We now hold that the court or judge may, under the present statute, act upon the petition of the relator without first laying a rule upon the respondents to show cause, and if satisfied that there are probable grounds for the filing of the petition, allow it to be filed. No hardship can result from this, when it is reflected that the summons, if ordered in vacation, must be



returnable on the first day of the next succeeding term; and if ordered in term time, it must be returnable on any day of the same term, not less than five days after the date of the writ, as shall be directed by the order of the court, (see *Quo Warranto* act, sec. 2,) and that the respondents, upon the return to the writ, may demur to the information and thus test its sufficiency, or, if it be sufficient, by plea set up any defense why judgment should not be pronounced upon it against the respondents. (See *Quo Warranto* act, sec. 4.) When the court had here allowed the information to be filed and ordered the summons to be issued, its discretionary powers were exhausted, and the issues of fact and of law presented by the pleadings must then have been tried and determined 'in accordance with the strict rules of law, in the same manner and with the same degree of strictness as in ordinary cases.' (High on Extraordinary Legal Remedies, latter part of sec. 606.) It is not denied that if the order to issue the summons had been made under a misapprehension of some fact material to be known by the court before making such order and but for which it would not have been made, it would have been competent for the court to vacate the order at any time during the term. But the court here acted upon no such mistake. It simply allowed that which should have been interposed as a defense on the final hearing to be urged as a ground for vacating the order." The opinion in *Golden Rule* case was by Mr. Chief Justice Scholfield, who also delivered the opinion of the court in *Attorney General v. Chicago and Evanston Railroad Co. supra*, and the two cases are important as showing the proper practice in cases like the one at bar. In *People v. Heidelberg Garden Co.* 233 Ill. 290, it is said: "It needs no citation of authorities to show that, except as where changed by statute, common law pleadings govern in this State in civil actions, and section 10 of the Practice act (Hurd's Stat. 1905, p. 1532,) shows clearly that it was intended therein

that the pleadings in matters of this kind should be in accordance with the common law. See, also, on this point, 17 Ency. of Pl. & Pr. 457; *People v. Healy*, 230 Ill. 280; *Bishop v. People*, 200 id. 33; *Hepler v. People*, 226 id. 275."

We think that according to the weight of authority the proper practice in the case at bar would have been to overrule the motion of the respondent to set aside the order granting leave to file the information and permit respondent to demur or plead to the information as it saw fit, so that the cause could be heard and determined according to the established rules of practice and as provided in the Quo Warranto statute.

It is further insisted by respondent in argument that the information filed is based upon matters not set up in the petition as grounds for the granting leave to file the information. Section 4 of the Quo Warranto act points out the manner in which defects or imperfections in an information may be taken advantage of, and until that method has been pursued and the sufficiency of the information passed upon by the lower court that question is not before us for review. We will therefore not pass upon it at this time.

For the reasons given, the judgment of the circuit court of Cook county will be reversed and the cause remanded, with directions to deny the motion to vacate the order granting leave to file the information and for further proceedings not inconsistent with the views herein expressed.

*Reversed and remanded.*

NOTE.—The same order will be entered in *People v. Union Consolidated Elevated Railway Co.* (No. 9690,) submitted with this cause. .

F. G. ALLEN *et al.* Appellants, *vs.* THE UNITED STATES  
FIDELITY AND GUARANTY COMPANY, Appellee.

*Opinion filed October 27, 1915.*

1. COUNTIES—*county treasurer is not entitled to separate compensation as supervisor of assessments.* The act of 1898 and the amended law of 1903, making the county treasurer *ex-officio* supervisor of assessments, do not create a new office but simply add other duties to the office of county treasurer, and such officer is not entitled to separate compensation as supervisor of assessments. (*Foot v. Lake County*, 206 Ill. 185, followed.)

2. SURETIES—*when decree against surety is not conclusive in his suit on indemnity bond.* In a suit on an indemnity bond given to sureties on a treasurer's bond a decree against the sureties on the treasurer's bond is not conclusive as to liability on the indemnity bond, where the wording of the conditions in the two bonds is not the same.

3. CONSTRUCTION—*what may be considered in construing condition of a bond.* That construction which the parties themselves have adopted in their pleadings, together with the punctuation in the condition of the bond, may be considered in determining what is the natural and reasonable meaning of such condition.

4. EVIDENCE—*pleadings are admissible.* All pleadings are admissible in evidence, their weight to be determined from all the facts and circumstances under which they are made.

5. SAME—*admissions of attorneys are the admissions of their clients.* Attorneys are deemed agents of their clients for the purpose of making admissions in all matters relating to the progress and trial of an action, and such admissions are treated as the admissions of the client.

6. SAME—*when admissions may be proved at subsequent trial or in separate action.* Where the admissions of attorneys are general and not limited to the purposes of the trial they may be proved at a subsequent trial of the same case or in another action.

7. SAME—*when briefs are admissible.* The admissions in the briefs of the attorneys, made during the trial of a case, are admissible against the client if they appear to be made by his direction and from his personal knowledge.

8. FRAUD—*when retaining compensation under doubtful right will not amount to fraud.* A county treasurer who retains fees as his compensation for services as supervisor of assessments under a statute providing that he shall receive such compensation and under the advice of competent attorneys that he is entitled to it

will not be deemed guilty of fraud, even though the courts had held, under a former similar statute, that county treasurers were not entitled to such compensation.

9. *SAME—actual or positive fraud defined.* Actual or positive fraud, in its most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith.

10. *BONDS—condition of indemnity bond construed.* A condition in an indemnity bond that the obligor shall reimburse the obligees for any loss they may sustain by reason of any "act of fraud or dishonesty, amounting to larceny and embezzlement," on the part of their principal, indemnifies only against a loss caused by an act of positive fraud or dishonesty on the part of the principal amounting to larceny or embezzlement, and does not include mere errors of judgment or carelessness upon his part. (*City Trust Co. v. Lee*, 204 Ill. 69, distinguished.)

11. *PRACTICE—when court may direct a verdict.* If there is no evidence, or but a scintilla of evidence, tending to prove the averments of the declaration, the jury should be directed to return a verdict for the defendant, but if there is in the record any evidence from which, if it stood alone, the jury can reasonably find that all material averments of the declaration have been proved, then the cause should be submitted to the jury.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Rock Island county; the Hon. ROBERT W. OLMSTED, Judge, presiding.

J. T. & S. R. KENWORTHY, and J. B. & J. L. OAKLEAF, for appellants.

JUDAH, WILLARD, WOLF & REICHMANN, and SEARLE & MARSHALL, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

David H. Lyons was county treasurer of Rock Island county, Illinois, for the term of four years beginning in December, 1902. The appellants, F. G. Allen and fourteen others, were sureties on his official bond. These sureties ob-

tained from appellee, the United States Fidelity and Guaranty Company of Baltimore, Maryland, an indemnifying bond, which was by renewals kept in force during the entire term of the said Lyons as county treasurer. During this time the county treasurers in this State were *ex-officio* supervisors of assessments in their respective counties under the Revenue law of 1898 as amended in 1903, (Hurd's Stat. 1913, p. 2076,) which law provided that in counties of the population of Rock Island the treasurer should "receive as compensation for his services as supervisor of assessments the sum of \$1000 per annum." Lyons retained during said term of office, as his compensation as supervisor of assessments, \$3416.70. In December, 1906, just before his term expired, the county board instructed the State's attorney of that county to procure an opinion from the Attorney General as to Lyons' right to retain this amount. On receiving an opinion from the Attorney General that Lyons had no legal right to retain said sum as his compensation, the county board caused a suit in chancery to be begun and prosecuted against him and the sureties on his official bond, to reform the bond and recover such amount. A decree was entered against Lyons and his sureties in accordance with the prayer of the bill, and on appeal to the Appellate Court was affirmed. (*People v. Lyons*, 168 Ill. App. 396.) That decree ordered the payment of said sum, with interest and costs. The sureties thereupon paid the amount so found due and brought this action against appellee, the guaranty company, on its bond, claiming a liability for the sum so paid, with costs and expenses, amounting in all to \$5123.64. On the trial of this case in the circuit court of Rock Island county before a jury the trial judge directed a verdict in favor of appellee, and judgment was entered thereon against appellants. On appeal to the Appellate Court for the Second District that judgment was affirmed, and the case is brought here on certificate of importance.

This court has held that the act of 1898, making the county treasurer *ex-officio* supervisor of assessments, did not create a new office but simply added other duties to the office of county treasurer, and that such officer was not entitled to separate compensation as supervisor of assessments. (*Foote v. Lake County*, 206 Ill. 185; *Parker v. Richland County*, 214 id. 165; *People v. Bowman*, 253 id. 234; *Jones v. O'Connell*, 266 id. 443.) The same holding must necessarily be made with reference to a similar provision in the amended law of 1903. The case of *Foote v. Lake County*, *supra*, was not decided until 1903, after Lyons qualified as county treasurer. Under the decisions of this court there can now be no question that he had no legal right to retain any money as supervisor of assessments by virtue of the provisions of the statute of 1898, or as amended in 1903. During his term of office, however, acting on the advice of competent attorneys that he had a legal right so to do, he retained as his compensation as supervisor of assessments the said \$3416.70. At the time of this trial he was living in New York, apparently in poor health and unable to re-pay the amount so retained.

On the hearing in the trial court the pleadings in the chancery suit brought against the sureties on Lyons' bond were introduced in evidence. Appellants contend that this record shows that they gave notice to appellee of said chancery action, and therefore that the decree in that case is conclusive upon said guaranty company. With this we do not agree. The basis of this argument is that the appellee stands in the place of Lyons and the liability under this indemnifying bond to the sureties is the same as Lyons' liability. If the wording of the conditions in the two bonds were the same there might be merit in this argument. The official bond of Lyons was conditioned that he should "justly and fairly account for and pay over all moneys that may come into his hands by virtue of his said office, and

shall well and truly perform all and every act and duty enjoined upon him by the laws of this State to the best of his skill and ability, and shall deliver up all moneys, papers, books, records and other things appertaining to said office, whole, safe and undefaced, when lawfully required to do so." The indemnifying bond given by appellee to said sureties was conditioned that it would "pay and reimburse the obligees aforesaid all costs, losses, damages and expenses which they may sustain or suffer by reason of any act of fraud or dishonesty, amounting to larceny or embezzlement on the part of the said David Hamilton Lyons, in connection with the duties of his said office, and which shall have been committed during the period from December 1, 1902, to December 1, 1903." At the expiration of the annual periods this bond was successively renewed yearly and extended with the same condition to December 1, 1906. Obviously, the language of the condition in Lyons' official bond was broader and covered other and additional liabilities as to losses than was intended to be covered by the condition in the indemnity bond. Appellee company by this bond undertook to restrict its liability, and did not intend to become liable for acts resulting from mere errors of judgment or carelessness on the part of Lyons, for which appellants, as sureties on Lyons' official bond, were clearly responsible.

Appellants earnestly argue that the words in the indemnifying bond, "amounting to larceny or embezzlement," etc., qualify only the word "dishonesty" and not the word "act," and that therefore appellee is responsible on this bond for any act of fraud on the part of Lyons even though it did not amount to larceny or embezzlement. There is merit in the argument of counsel for appellee that under the pleadings in this case the appellants are estopped from recovering under such construction of the bond, for the amended declaration assigns as a breach of the indemnity bond that Lyons "failed and omitted to turn over to said

county all moneys in his hands at the end of his said term of office but fraudulently converted the same to his own use, and that he, the said Lyons, was guilty of fraud or dishonesty, amounting to larceny or embezzlement, in not turning over to said county moneys," etc. This wording of the declaration, in connection with the rest of the pleadings,—especially certain of the replications filed by appellants,—might fairly be construed as permitting appellants to recover only if Lyons were guilty of such fraud as amounted to larceny or embezzlement. Waiving this point, however, we are of the opinion that the words "amounting to larceny or embezzlement" qualify the word "act" and not the word "dishonesty," and that therefore the bond indemnified appellants only against loss caused by reason of any act on Lyons' part in connection with his office, either fraud or dishonesty, amounting to larceny or embezzlement. This, in our judgment, is the natural and reasonable construction of the condition of said bond. The punctuation in this condition, as found in the record, lends support to this construction. While punctuation, in the consideration of a contract or other writing, is not necessarily controlling, it may shed light on the meaning of the parties. *Osborn v. Farwell*, 87 Ill. 89; *Crawford v. Burke*, 201 id. 581.

Appellants insist that the reasoning of this court in *City Trust Co. v. Lee*, 204 Ill. 69, is not in harmony with this construction of the condition of this bond. The wording of the condition in that bond was not the same as in this. While the opinion of this court in that case does not show the exact wording of the bond, the condition was against loss "sustained by the employer by or through the dishonesty or any act of fraud of the employee amounting to larceny or embezzlement, in connection with the duties," etc. It was held there that the words "amounting to larceny or embezzlement" did not qualify the word "dishonesty" but only the word "fraud." The construction placed upon the



condition of that bond was doubtless correct, but that holding does not, under the different wording of this bond, conflict with the conclusion here reached.

The portion of the decree relied upon by appellants as being conclusive against appellee in this case is as follows: "He, the said Lyons, did retain, keep and convert to his own use a certain sum of money, to-wit, \$3416.70, which came into his hands and possession as county treasurer, as aforesaid, which said sum of money the said Lyons claimed he was entitled to as salary as supervisor of assessments of said county, but which said sum the court finds he was not so entitled to as supervisor of assessments or otherwise; \* \* \* that the said David H. Lyons has breached and violated his said official bond and the terms and conditions thereof, and the said bond is hereby declared forfeited." Among other parts of that record introduced here was a stipulation reading: "It is stipulated and agreed between the parties hereto, by their respective counsel, that the sum of \$3416.70 found by the decree to be due from the defendant to the complainant is moneys retained by the defendant, David H. Lyons, under the claim of right as salary for his services as supervisor of assessments, and that said sum is the exact amount that his salary would amount to, providing he is entitled to be allowed compensation as supervisor of assessments." Said decree of the circuit court also found, in accordance with this stipulation, that Lyons had kept this money claiming that he was entitled to it as supervisor of assessments. The answer of appellants filed in the chancery suit and introduced in this cause averred that Lyons had justly and fairly accounted for all moneys that came into his hands by virtue of his office as county treasurer, and appellee argues that in connection with the decree and other parts of the files and record introduced should also be considered the briefs filed in the Appellate Court on the trial of the chancery case, introduced by appellees below in this case, in which counsel

who represented the sureties in that case and now represent the sureties in this case strongly urged that Lyons' conduct in the whole matter was entirely free from fraudulent acts, was open, honest and sincere, and that no question could be raised as to his good faith.

Appellants insist that the answer, stipulation and briefs were not admissible in evidence. This court has held that all pleadings are admissible in evidence, their weight to be determined from all the facts and circumstances under which they are made. (*Gardner v. Meeker*, 169 Ill. 40; *Wadsworth v. Duncan*, 164 id. 360; *Daub v. Englebach*, 109 id. 267; *Robbins v. Butler*, 24 id. 387.) Attorneys are deemed agents of their clients for the purpose of making admissions in all matters relating to the progress and trial of an action. Such admissions are treated as the admissions of the client. (Jones on Evidence,—2d ed.—sec. 257.) If such admissions are general and not limited to the purposes of the trial they may be proved at a subsequent trial of the same case or in another action. (1 Ency. of Evidence, 465.) Admissions in the briefs of the attorneys, made during the trial of a case, are admissions against the client if they appear to be made by his direction and from his personal knowledge. (1 Greenleaf on Evidence,—16th ed.—sec. 186; *Wood v. Graves*, 144 Mass. 365.) There can be no question that the pleadings and stipulation in question were admissible in this case. Neither do we think there is any error, in view of the facts in this record, in admitting the briefs in question, but whether these briefs were admissible or not, we think the result reached in the trial of this cause must necessarily have been the same.

Appellants concede in their argument that there is no question of fact in dispute, unless it be the intention of Lyons in taking the money and appropriating it to his own use. We cannot see how there can be any dispute as to his intention. We find no evidence in the record that shows, or

even tends to show; that he was guilty of larceny or embezzlement in retaining this money. Not only his testimony, but all the evidence found in this record, and all the facts bearing on this question in the record of the chancery suit introduced here, prove beyond question that he kept the money because he was advised by competent attorneys, who now represent the appellants in this case, that under the law he was entitled to retain it as compensation for his services as supervisor of assessments. The revenue statute then on the statute book, and as it now stands by amendment, stated that he should receive such compensation. At the time he went out of office there might have been an honest difference of opinion as to whether the statute as amended did not give him that right. Clearly, his acts were not such as to make him guilty of larceny or embezzlement in retaining such money, even though the courts have held that he was not entitled to the salary. No one claimed or even suggested that the officials of this State were criminally liable after the decision of this court in *Whittemore v. People*, 227 Ill. 453, where it was held that certain State officials had improperly kept fees for their services under circumstances very similar to the retention of this money by treasurer Lyons. In construing a similar indemnity bond in *Clifton Manf. Co. v. United States Fidelity and Guaranty Co.* 38 S. E. Rep. (S. C.) 790, it was held that in order to show that the guaranty company was liable for money entrusted by the manufacturing company to its agent to be expended in a certain manner but which the agent used for himself, a criminal intent on the agent's part must be proven before it could be found that he was guilty of fraud or dishonesty. If it is conceded, for the purposes of this case, that counsel for appellants are correct in their construction of the condition in the indemnity bond we cannot see how it can be fairly asserted that Lyons was guilty of fraud in retaining this money. Fraud, as used in this bond, must mean positive fraud, involving moral

turpitude or intentional wrong, and not merely constructive fraud. (*Crawford v. Burke, supra*, and cases there cited.) Actual or positive fraud, "in its most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith in the broad meaning given to the term by equity,—the *bona fides* of the Roman law." (2 Pomeroy's Eq. Jur.—3d ed.—sec. 873.) The proof in this record shows, without the slightest contradiction, that Lyons with the utmost good faith and under the advice of attorneys kept this money.

Counsel for the appellants further argue that the court erred in directing a verdict in this case. The rule in this State is, that if there is no evidence, or but a scintilla of evidence, tending to prove the averments of the declaration, the jury should be directed to return a verdict for the defendant. If, however, there is in the record any evidence from which, if it stood alone, the jury could, "without acting unreasonably in the eye of the law," find that all of the material averments of the declaration had been proven, then the cause should be submitted to the jury. (*Libby, McNeill & Libby v. Cook*, 222 Ill. 206, and cases there cited.) We find not even a scintilla of evidence in this record that indicates that the acts of Lyons in keeping this money involved moral turpitude on his part. The trial court therefore rightly directed a verdict in favor of appellee. This being so, we need not pass on the questions raised by appellants as to alleged errors in admitting improper and incompetent evidence, as they in no way affected the question of Lyons' intention or his good faith in retaining this money.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. JOHN C. KRITTENBRINK, Plaintiff in Error.

*Opinion filed October 27, 1915.*

1. CRIMINAL LAW—*ownership is necessary averment of indictment for receiving stolen property.* The ownership of the property is a necessary averment of an indictment for receiving stolen property and must be proved as alleged.

2. SAME—*in whom ownership shall be alleged.* Where an averment of ownership is necessary in an indictment, the ownership must be alleged in a person, corporation or other entity that may be the owner of property.

3. SAME—*indictment may refer to drug by its general term instead of complete scientific name.* The general term "codeine," used in an indictment for receiving stolen property, is sufficient to include the special preparation known as triturate of codeine.

4. SAME—*what not sufficient proof of existence of corporation.* The opinion of a witness that a company did business as a corporation is not sufficient proof that such company is a corporation, where no facts are shown upon which such opinion was based and there is no proof of user of corporate franchises.

5. SAME—*what evidence is incompetent to prove one guilty of receiving stolen property.* In a prosecution for receiving stolen property, consisting of drugs, evidence that a burglary was committed on a certain night and quantities of drugs stolen is not competent, where it is not shown that any part of the property so stolen came into possession of defendant or that he had any knowledge of or connection with the particular burglary or larceny.

6. INSTRUCTIONS—*those instructions may be refused which are covered by others given.* Where an instruction is covered by other instructions it may be refused, but when not covered in all respects by any other instruction it should be given if otherwise unobjectionable.

7. SAME—*when an ill-drawn and verbose instruction should not be refused.* An instruction, though ill-drawn and verbose, stating true principles as to the presumption of innocence and reasonable doubt, should not be refused if these principles are not stated to the jury in any other instruction.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. ADELOR J. PETIT, Judge, presiding.

HENRY A. DAUGHERTY, and GEORGE M. BAGBY, for plaintiff in error.

P. J. LUCEY, Attorney General, MACLAY HOYNE, State's Attorney, and C. H. LINSKOTT, for the People.

Mr. JUSTICE DUNN delivered the opinion of the court:

John C. Krittenbrink was convicted of receiving a quantity of stolen morphine and codeine, the property of Parke, Davis & Co., a corporation, for his own gain and to prevent the owner from again possessing its property, well knowing the said goods to have been stolen.

It is insisted that the conviction is contrary to the evidence. There was no legal evidence that Parke, Davis & Co. was a corporation, as alleged in the indictment. The ownership of the property was a necessary averment of the indictment and it was necessary to prove such ownership as alleged. (*Aldrich v. People*, 225 Ill. 610.) Where an averment of ownership is necessary, the ownership must be alleged in a person, corporation or other entity that may be the owner of property. (*People v. Brander*, 244 Ill. 26.) The only evidence in regard to the incorporation of Parke, Davis & Co. was the testimony of a witness who was permitted, over the objection of plaintiff in error, to answer the question whether in the years 1914, 1913 and 1912, and at any prior time, Parke, Davis & Co. did business as an individual, co-partnership or a corporation. He answered, "as a corporation." This evidence was incompetent. It afforded no proof of user of corporate franchises. It was merely the opinion of the witness. No facts were shown on which it was based, and the record contains no evidence from which it can be lawfully inferred that Parke, Davis & Co. was a corporation. (*People v. Fryer*, 266 Ill. 216.) Since the judgment must be reversed for lack of evidence to sustain this essential averment of the indictment we shall

not discuss the other evidence in the case, which was conflicting.

The State introduced the evidence of three witnesses, employees of Parke, Davis & Co., who testified to the stealing by them of quantities of morphine and codeine from their employer and the sale of the stolen property to the defendant, the transactions continuing for a year or more before June 6, 1914. The State was permitted, over the objection of plaintiff in error, to prove a burglary committed by two of these witnesses of the premises of Parke, Davis & Co. and the stealing of morphine and codeine on the night of June 18, 1914. There was no claim and no evidence that any part of the property stolen as the result of this burglary ever came to the possession of the plaintiff in error or that he had any knowledge of or connection with the burglary or larceny. This evidence was incompetent and should not have been received. *Schultz v. People*, 210 Ill. 196; *People v. Baskin*, 254 id. 509.

The objection is made that evidence was admitted as to the delivery to the defendant of triturate of codeine, which was not mentioned in the indictment. The variance was not material. The general term "codeine," used in the indictment, was sufficient to include the special preparation known as triturate of codeine.

Objection was made to the refusal of instructions Nos. 44, 45, 46, 49 and 52 asked by the plaintiff in error. Instruction No. 44 is the same as instruction No. 3 given for the defendant in the case of *Bressler v. People*, 117 Ill. 422, and relates to the matter of reasonable doubt. The question of reasonable doubt, as far as this instruction is concerned, is covered by other instructions on behalf of the People and the defendant, and it was not error to refuse the instruction. The substance of instruction No. 45 was given in People's instructions Nos. 6 and 10. Instruction No. 46 was the same as defendant's instruction No. 13 in *Bressler v. People*, *supra*. It related to the testimony of the defendant, was not

covered in all respects by any other instruction and should have been given. Instruction No. 49 was covered by defendant's instruction No. 20. Instruction No. 52 was as follows:

"The court instructs the jury that the law presumes the defendant to be innocent of the charges preferred against him by the indictment returned to the court by the grand jury until all of the allegations in one or both of the counts in such indictment have been proven to be true beyond a reasonable doubt, and the law is that he is entitled to have this jury indulge in the presumption of innocence toward him until you may believe, from all the evidence, that he has been proven guilty beyond a reasonable doubt, and the fact that he has been indicted by the grand jury upon the charges of larceny and of receiving stolen property, and is now being tried upon those charges, is not any evidence of his guilt; and you are not to consider that the fact that there was an indictment in this cause any evidence of his guilt, and if you convict the defendant you must do so upon all the evidence in the case, and you cannot give any weight to any belief to which you may arrive unless that belief be founded upon the facts in evidence introduced before you in this case, and if, after consideration of all the facts and circumstances proven in this case, you then have a reasonable doubt in your mind as to the defendant's guilt as to said charges, then it is your duty to find him not guilty."

Though this instruction is ill-drawn and verbose, the rules stating that the indictment is no evidence of the defendant's guilt and should not be so considered by the jury, and that the presumption of innocence continues with the defendant until the jury are convinced by the evidence, beyond a reasonable doubt, of his guilt, were not stated to the jury in any other instruction, and it was therefore erroneous to refuse this instruction.

Objection is made to the conduct and remarks of the court in the progress of the trial and to the argument of the attorney for the People to the jury. In both cases there



was room for just criticism. Whether the conduct, remarks and argument objected to were such as should have reversed the judgment it is not necessary to determine, since the judgment must be reversed for the reasons heretofore given. Counsel for the plaintiff in error were unduly restricted in the cross-examination of the three witnesses for the People who were confessed thieves and were the only witnesses testifying to any facts directly implicating him in the crime charged.

The judgment will be reversed and the cause remanded.

*Reversed and remanded.*

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DAVID HOLMGREN, Appellant, vs. THE CITY OF MOLINE  
*et al.* Appellees.

*Opinion filed October 27, 1915.*

1. CONSTITUTIONAL LAW—*amendment of 1913 to act relating to city hospitals not invalid.* The amendment of 1913 to section 6 of the act concerning city hospitals, which authorizes the pledging, for hospital extension, of hospital taxes for a period of five years and the issuing of warrants payable out of such taxes, does not violate section 12 of article 9 of the constitution, which restricts the power of a municipal corporation to become indebted.

2. SAME—*fact that the City Hospital act amends another act by implication does not render it invalid.* The fact that the amendment of 1913 to the act concerning city hospitals amends by implication, and without reference thereto in its title, the provision of the act requiring ordinances for the issuing of bonds to be submitted to a vote of the people, does not render the amendment invalid as a violation of section 13 of article 4 of the constitution, as the act concerning the construction of hospitals is complete in itself.

3. SAME—*repeals or amendments by implication are not necessarily prohibited by section 13 of article 4.* An act complete in itself does not violate section 13 of article 4 of the constitution merely because it repeals or amends some prior law by implication, as any new provision of law may to some extent change the provisions of former statutes, and whenever there is an irreconcilable conflict between two acts, the later act, to the extent of the conflict, repeals the earlier one by implication.

4. SAME—*issuing warrants against future hospital taxes is "becoming indebted."* The amendment of 1913 to section 6 of the act for the extension of hospitals does not authorize a city to issue warrants against future hospital taxes in any greater amount than will, with existing indebtedness, equal the constitutional limit of five per cent, as issuing warrants against future taxes, though to be kept in a special fund, is "becoming indebted."

APPEAL from the Circuit Court of Rock Island county;  
the Hon. F. D. RAMSAY, Judge, presiding.

SHALLBERG & HARPER, for appellant.

JAMES M. JOHNSTON, for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

The city of Moline, having a population of about thirty thousand, has established and is maintaining a public hospital under the act of 1891 to enable cities to establish and maintain public hospitals. Section 6 of this act was amended in 1913 so as to authorize the directors of hospitals organized under the act, "by the consent of two-thirds vote of the said board, and by the consent of two-thirds vote of the city council of said city, for the purpose of constructing additional buildings for said hospital, to pledge the taxes to be collected for hospital purposes for a period not to exceed five years, and to anticipate the collection of said taxes for a period not to exceed five years, by issuing warrants or vouchers for that purpose, the same to be signed by the president and secretary of the hospital board and by the mayor and city clerk or commissioner of accounts and finance of said city, and be payable only out of the taxes to be collected for hospital purposes in said city for said period not to exceed five years, and it shall not be necessary for said board or said city council of said city, to submit the question of issuing said warrants or vouchers to a vote of the people." (Hurd's Stat. 1913, p. 214.) Afterward the board of di-

rectors of the city hospital adopted a resolution giving its unanimous consent to the issuance of \$70,000 of warrants or vouchers, of \$1000 each, to bear five per cent interest per annum, payable semi-annually, \$14,000 of said warrants or vouchers to become due on the first day of July in the years from 1915 to 1919, both inclusive. The resolution further provided that so much of the taxes to be collected for hospital purposes for the years 1914 to 1918, both inclusive, as might be necessary to produce the sums needed to pay said bonds, principal and interest, as they mature, should be and were pledged by the hospital board for the purpose of paying said warrants or vouchers, and interest, as they became due. Later the city council passed an ordinance whereby it gave its unanimous consent to the board of directors of said hospital to issue the warrants or vouchers specified in the resolution of the board of directors, and provided that for the purpose of providing for the payment of the principal and interest of the warrants or vouchers so authorized as they respectively became due, the taxes levied and collected for hospital purposes for the years 1914 to 1918, both inclusive, were pledged for the payment of said warrants or vouchers, and that there should be collected a direct annual tax upon all taxable property in the city of Moline to the amount authorized by law, viz., the tax not to exceed three mills on the dollar, annually, to be known as the "hospital fund," being sufficient in amount to produce the amount of the principal and interest of such warrants or vouchers. In pursuance of the foregoing resolution and ordinance the board of directors of the city hospital have had prepared, printed and signed by the proper officials, ready for sale and disposal, warrants or vouchers to the amount of \$70,000, which they are making an effort to sell and are about to sell and dispose of. The appellant filed a bill against the city of Moline, the board of directors of the city hospital, the mayor and the commissioner of accounts

and finance of the city, setting out the facts above stated and representing that the value of the property in the city of Moline, as ascertained by the last assessment for State and county taxes, was \$6,937,852, that the present indebtedness of the city is \$300,000, and that the limit of indebtedness which the city can lawfully incur is \$346,892.62. The bill alleges that the amendment of 1913 to the act to enable cities to establish and maintain public hospitals is in violation of section 12 of article 9 of the constitution, and that the warrants proposed to be issued pursuant to the authority of such amendment would increase the indebtedness of the city to an amount exceeding the constitutional limitation. The bill prays for an injunction against the issuance of the warrants. A general demurrer to the bill was sustained, it was dismissed for want of equity, and the complainant has appealed.

Section 12 of article 9 of the constitution provides that no county, city, township or school district or other municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per cent of the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness. The amendment in question does not violate this limitation. It does not authorize the incurring of an indebtedness beyond the five per cent limit. If the warrants to be issued are to be regarded as evidences of indebtedness incurred, the only effect of the constitutional limitation would be to restrict the amount to five per cent of the assessment. The issuing of the warrants is no more a violation of this constitutional limitation than the borrowing of money in any other way. The effect of the limitation is only to restrict the power to within the five per cent limit.

It is further contended that the amendment to section 6 of the Hospital act is in conflict with section 13 of arti-

cle 4 of the constitution, because it amends section 1 of the act requiring cities, villages and incorporated towns to submit certain ordinances authorizing the issuing of bonds to the voters, (Hurd's Stat. 1913, p. 466,) and does not refer in the title to such amendment. The act referred to provides that "no ordinance passed by the city council of any city \* \* \* which provides for or authorizes the issue of bonds \* \* \* shall become operative, effective or valid until any such ordinance shall have been submitted to the voters of any such city," etc. The amendment to section 6 of the Hospital act provides that it shall not be necessary to submit the question of issuing the warrants provided for by the amendment to a vote of the people, and therefore it is inconsistent with the above mentioned statute, and its effect is to amend that paragraph by implication so that it shall not apply to the issue of such warrants. Repeals or amendments by implication of previous acts are not necessarily within the prohibition of section 13 of article 4 of the constitution. An act complete in itself does not violate the constitutional provision merely because it repeals, modifies or amends by implication a former act. Any new provision of law may to some extent change the provisions of former statutes, and whenever there is an irreconcilable conflict between two acts, to the extent of the conflict the later act amends the earlier by implication. If the later act is not amendatory in form and is perfect and complete in itself it is not within the prohibition of the constitution. It is not necessary when a new act is passed that all prior acts modified by implication shall be re-enacted and published at length. (*People v. Crossley*, 261 Ill. 78.) The act authorizing the construction of hospitals is an independent act, complete in itself, without any reference to the act requiring ordinances for the issue of bonds to be submitted to a vote of the people, and is not rendered obnoxious to the objection made to it by the incidental modification of the

latter act so as to exempt the warrants provided for, from its requirements.

Assuming the constitutionality of the amendment to section 6 of the Hospital act, the appellant contends that the warrants or vouchers intended to be issued are illegal and void because they would create an indebtedness in excess of the constitutional limit. It is conceded by the demurrer that the city of Moline is indebted to within \$46,892 of its constitutional limit. Manifestly, therefore, it cannot constitutionally incur indebtedness in excess of that amount, and if the effect of the issue of the warrants would be to create an indebtedness of the city, their issue would be in violation of the constitution. The appellees contend that they do not create any such indebtedness; that since they are payable out of a special fund, which alone is pledged for their payment, they impose no burden upon the city and do not create a debt within the meaning of the constitution. This is only a variation of the positions taken by the appellants in *Hodges v. Crowley*, 186 Ill. 305, *City of Joliet v. Alexander*, 194 id. 457, and *Village of East Moline v. Pope*, 224 id. 386. In all of these cases it was undertaken to obtain an advance of money for immediate use, which was to be re-paid out of funds raised by taxation without creating indebtedness. In *Hodges v. Crowley*, *supra*, an act was passed authorizing the levy, at one time, of a tax for ten years for the building or repairing of roads subject to overflow and the issue of anticipation warrants for the full amount of the levy based on the assessment of the preceding year. It was held that anticipation warrants could not be issued in the aggregate amount of the tax for ten years so as to relieve the transaction of the character of "becoming indebted" beyond the constitutional limit. In *City of Joliet v. Alexander*, *supra*, it was held that an ordinance of a city for the extension of a system of water-works under the act of 1899, providing that all income from the system

should constitute a water fund, to be used exclusively to meet the expenses of the system and to pay the extension certificates, created a debt, which might be enjoined where the city's debt had already reached the constitutional limit. It was said on page 464: "It does not make any difference that the certificates are payable out of the special fund if the city is the owner of the fund. All its obligations are payable out of some particular fund. The city council is required, in raising money by taxation, to make appropriations, specifying the objects and purposes for which they are made and the amount appropriated for each object and purpose. The money and appropriation raised for one purpose cannot be applied to any other, and the accounts of each fund and appropriation, and the debts and credits belonging thereto, must be kept in a separate account. The debts chargeable to a particular fund are payable only out of that fund, and it makes no difference what fund they are chargeable to or payable out of, if the fund is one which belongs to the city. (Hurd's Stat. 1899, chap. 24, art. 7, p. 282.) The section of the constitution limiting indebtedness provides that at the time of incurring any indebtedness the city shall provide for the collection of a direct annual tax sufficient to pay the interest on the debt as it falls due and to pay and discharge the principal within twenty years from the time of contracting the debt, and every indebtedness is payable from some particular fund." In *Village of East Moline v. Pope*, *supra*, (a case under the same statute of 1899,) it was held that a city indebted up to the limit imposed by the constitution has no power to issue bonds to pay for the construction of a water-works system where such bonds are payable out of the income of the system, or, if such income is insufficient, out of a sinking fund created by levying a tax of one per cent for a certain period of years, and that bonds issued by a municipal corporation are evidence of an indebtedness within the meaning of the con-

stitution, notwithstanding they are made payable out of a special fund to be created by levying a tax for that purpose, only.

The State of Iowa has a constitutional provision similar to ours. This question arose in that State, and in *Swanson v. City of Ottumwa*, 59 L. R. A. 620, (118 Iowa, 161,) the Supreme Court of Iowa held that the issue of bonds by a municipality to procure funds for a water supply, which are payable out of a sinking fund to be provided by a special tax upon the property within the municipality and for which there can be no general liability on the part of the city, does not create an indebtedness within the meaning of the constitutional limitation of municipal indebtedness. In that suit brought in the State court it was held that the issue of the bonds could not be enjoined, but the same question was brought before the United States circuit court of appeals in a suit by a non-resident of the State to enjoin the issue of the same bonds, and the latter court, treating the question as one of general law, in which the Federal courts are not bound by State decisions, held that the issue of the bonds would create an indebtedness against the city and affirmed the judgment of the circuit court enjoining their issue. (*City of Ottumwa v. City Water Supply Co.* 119 Fed. Rep. 315; 59 L. R. A. 604.) The latter decision is in accord with our own decisions which have been cited.

It follows that the demurrer to the bill was improperly sustained. The city has only the right to issue warrants which, including the indebtedness already existing, will not exceed the constitutional limitation. *Wabash Railroad Co. v. People*, 202 Ill. 9.

The decree is reversed and the cause remanded, with directions to overrule the demurrer.

*Reversed and remanded, with directions.*



THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. EDGAR M. DAVIS, Plaintiff in Error.

*Opinion filed October 27, 1915.*

1. CRIMINAL LAW—*what is not sufficient proof to show embezzlement.* Mere proof of the receipt of funds and failure to account therefor is not sufficient, in itself, to show embezzlement, but there must be other evidence of the conversion.

2. SAME—*proof must show that the defendant fraudulently converted to his own use the funds received.* The mere depositing in his private account of the proceeds of notes, bonds and stocks received by an agent from his principal does not show that he is guilty of embezzlement or fraudulent conversion, but there must be proof, beyond a reasonable doubt, that he converted to his own use some of the property received by him.

3. SAME—*when conviction for embezzling proceeds of sale of bonds cannot be sustained.* A conviction for embezzling the proceeds of the sale of bonds cannot be sustained where that offense is not charged in the indictment nor mentioned in the bill of particulars, the charge being embezzlement of the bonds themselves.

4. SAME—*general rule as to force of positive testimony of an unimpeached witness.* Positive testimony of a witness, uncontradicted and unimpeached either by direct testimony or circumstantial evidence, cannot, as a general rule, be disregarded but must control the decision of the court or jury, particularly where it is not inherently improbable or contradictory.

5. SAME—*where venue of indictment for embezzlement should be laid.* The venue of an indictment charging embezzlement, consisting of a failure to account, should be laid in the county and State where the accused was under obligation to account, and if the parties treated the home of the principal as the place of accounting the venue of the indictment is properly laid there, even though the power of attorney under which the accused acted is silent as to the place of accounting and no agreement in regard thereto is shown.

6. SAME—*when demand is not a part of offense of embezzlement.* Where an indictment for embezzlement is based upon sections 74 and 75 of the Criminal Code a demand for an accounting is not a constituent element of the offense, as a demand is not essential unless made so by statute.

7. SAME—*when receipts to agent are admissible on trial for embezzlement.* A written receipt, properly identified, is *prima facie* evidence of the truth of the recitals which it contains, and on the

trial of an agent for embezzlement for failure to account, receipts given to the agent for payments made by him in the principal's business are competent evidence of the amounts paid.

8. SAME—*when instruction as to secreting with intent to embezzle is improper.* If there is no evidence tending to show that the accused secreted money, goods or property with intent to embezzle or fraudulently convert the same to his own use and no count in the indictment to that effect, instructions which embody that fact in defining the offense of embezzlement are improper.

9. SAME—*instructions should confine jury to evidence supporting bill of particulars.* Where a bill of particulars has been filed in an embezzlement case the instructions should confine the consideration of the jury to the evidence supporting the charges of such bill.

WRIT OF ERROR to the Circuit Court of Jersey county;  
the Hon. FRANK W. BURTON, Judge, presiding.

FERNS & SUMNER, and CHARLES P. WISE, for plaintiff  
in error.

P. J. LUCEY, Attorney General, and D. E. DETRICH,  
(W. J. CHAPMAN, State's Attorney, and GEORGE P. RAM-  
SEY, of counsel,) for the People.

Mr. JUSTICE CARTER delivered the opinion of the court :

This indictment for embezzlement was returned against plaintiff in error at the March term, 1914, of the circuit court of Jersey county. It contains six counts. The first charges him, as agent or attorney in fact of Anna B. Cross, with embezzling and fraudulently converting to his own use \$500,000 worth of her property and moneys. The second count is like the first, except that it charges him only as the attorney in fact of Anna B. Cross. The third charges him with embezzlement of a like amount of money of the goods, chattels and moneys of said Anna B. Cross then and there entrusted to him by her for safe keeping and management; the fourth, with the embezzlement of certain moneys, notes and securities of the value of \$500,000,

of the goods and property, chattels and money of said Anna B. Cross. The fifth charges him with receiving and taking possession, as the agent or attorney in fact of said Anna B. Cross, of \$100,000 worth of stock of the St. Louis Fire Insurance Company, of the property of the said Anna B. Cross, and embezzling and fraudulently converting said stock to his own use without her consent. The sixth is like the fifth, except that it charges plaintiff in error with embezzling first mortgage bonds of the Alton, Jacksonville and Peoria Railway Company of the value of \$50,000, the property of said Anna B. Cross. Defendant was out of the State at the time the indictment was found, but voluntarily returned, appeared and was arraigned and plead not guilty. On a trial before a jury a verdict of guilty was returned and judgment entered accordingly. After motions for new trial and in arrest of judgment were overruled plaintiff in error was sentenced to imprisonment in the Southern Illinois penitentiary until discharged by due process of law. This writ of error was thereafter sued out.

The proof on the trial showed that Andrew W. Cross, of Jerseyville, Illinois, died February 1, 1909, in St. Louis, Missouri, at the home of plaintiff in error, who was his son-in-law. By his last will and testament he left a legacy of \$3000 to his only child, Ida, the wife of the plaintiff in error, and the rest of his estate to his wife, Anna B. Cross, naming her as executrix without bond. Plaintiff in error was married to the daughter of Andrew W. and Anna B. Cross in 1898. They had lived most of the time after their marriage, up to the time of her father's death, in St. Louis, plaintiff in error being then president of the St. Louis Fire Insurance Company. On February 9, 1909, Mrs. Cross, while visiting at the home of plaintiff in error in St. Louis, shortly after the funeral, made and delivered to plaintiff in error a power of attorney authorizing him to sell any and all shares of stock belonging to her and receive dividends, execute bonds, deeds and notes, convey

real estate and give deeds for the same. This was duly acknowledged before a notary public in St. Louis. Mrs. Cross at this time was about sixty years of age and apparently very little acquainted with business methods or with the business or property of her husband, the latter having also attended, in his lifetime, to the financial matters in which she was interested. Mrs. Cross was duly appointed in the Jersey county court as executrix of her husband's will, and under the advice of plaintiff in error employed Davis' father as attorney to perform the legal work in connection with the estate.

At the time of his death, and for a number of years prior thereto, Andrew W. Cross was president of the National Bank of Jerseyville and was largely instrumental in the organization of the Alton, Jacksonville and Peoria Railway Company, an electric line which was planned to run between Alton and Peoria, through Jerseyville and Jacksonville. At the time he died the railway had only been constructed and put in operation from Alton to Godfrey, about five and a half miles. The evidence shows that in building this road he had assumed obligations to the amount of \$175,000, in round numbers, largely as indorser of notes to raise money which was expended in its construction. The evidence tends to show that this amount was about what his entire estate was worth. The inventory showed that he owned at the time of his death an undivided one-half of 320 acres of land in Wayne county, Nebraska, the whole of 320 acres in Cheyenne county, Nebraska, 800 acres in Gage county, Nebraska, some lots in Nebraska and Jerseyville, and 953\* acres of land in Jersey county; that he also owned notes and accounts amounting to about \$18,627.09 and stocks of the par value of approximately \$136,000, estimated to be worth at the time \$39,349.47, including \$5000 in par value of stock in the St. Louis Fire Insurance Company; that he had no cash on hand. The record shows that he had overdrawn his

bank account in the National Bank of Jerseyville \$338.79. Mrs. Cross' property at the time of her husband's death included a half interest in certain land in or near Jerseyville and the full interest in about 1100 acres and a half interest in about 320 acres in Nebraska, a half interest in a store building in Jerseyville and a half interest in a farm in Sangamon county. The other half interest in the Jersey county and Sangamon county land was owned by her sister, Mrs. Fletcher.

Immediately after being appointed attorney in fact by Mrs. Cross to take charge of her business affairs plaintiff in error undertook that work. It may be noted in this connection that Andrew W. Cross, a few weeks before his death, executed a power of attorney to plaintiff in error worded substantially the same as the power of attorney thereafter executed by Mrs. Cross. Cross' health, apparently, at the time he executed this power of attorney, was very poor, but there is nothing in this record to indicate that plaintiff in error took charge of Cross' business before his death, though plaintiff in error testified they had advised together quite often with reference thereto. Of the \$175,000 of debts owed by Cross at the time of his death only two claims were presented against his estate,—one for \$67,475.10 by the Mercantile Trust Company of St. Louis, which was allowed October 23, 1909, and one by the National Bank of Jerseyville for \$5740.63, allowed February 5, 1910. The claim of the Mercantile Trust Company was satisfied, so far as the estate of Cross was concerned, by borrowing from the American Trust Company of St. Louis a sufficient sum for the purpose, Mrs. Cross and Aaron O. Auten, then president of said electric railway company, giving their note therefor, dated December 24, 1909. For the remainder of the \$175,000 indebtedness Mrs. Cross at various times gave her personal notes. During Cross' lifetime said railway company had placed a mortgage on its property to secure an issue of \$2,000,000 first mortgage

bonds for the purpose of financing the company and constructing its road. The board of directors raised \$98,000 by selling \$15,000 of these bonds to the National Bank of Jerseyville and by borrowing from the Mercantile Trust Company of St. Louis \$83,000, represented by two notes of the railway company,—one for \$75,000 and one for \$8000,—signed or indorsed by each of the directors, Cross included, and further secured by \$1,985,000 of the said \$2,000,000 of bonds as collateral.

After the plaintiff in error took charge of Mrs. Cross' business the affairs of the electric railway demanded his immediate attention. February 15, 1909, said two notes last mentioned were protested for non-payment, and plaintiff in error, with the approval and co-operation of Mrs. Cross, borrowed \$10,000 and paid it on the notes. Later, with her approval, on May 19, 1909, he made a further payment of \$10,000, thus reducing said notes to \$63,000. Shortly after her husband's death Mrs. Cross discussed with plaintiff in error the business affairs of her husband and the condition in which he had left the electric railway. She said in her testimony that what she wanted to do was to go on with the railroad and save something for herself to live on. The testimony of plaintiff in error is also to the effect that Mrs. Cross stated that if the railroad could be constructed as planned it would be quite a monument to her husband. Shortly after this discussion, plaintiff in error, with the then president Auten and some others, attempted to raise money enough to continue the road to Jerseyville. They also considered plans looking toward the sale of the entire road but did not succeed in getting any satisfactory offer of purchase. It appears from the evidence that the railroad was not paying for its operation, and plaintiff in error raised money from the estate of Cross and the property of Mrs. Cross for its pay-rolls and other expenses. Having found it impossible to sell the road or raise more money on the \$2,000,000 bonds already issued

on the five and one-half miles constructed, the board of directors, with the approval of plaintiff in error, ordered a new issue of \$600,000 of bonds in order to pay off a part of the company's debts and to continue the work of construction. These bonds were issued and some of them sold in Alton in 1910 at ninety cents on the dollar. Contracts for construction work and material were entered into and the work of extending the road from Godfrey to Jerseyville begun. It was impossible to sell the rest of the bonds, and the best that could be done was to borrow money from the banks and use the bonds as collateral security for such loans, and apparently contractors and material-men were induced to accept some of these bonds as part payment of their claims. The funds thus raised proving inadequate, money was advanced by plaintiff in error from time to time to meet the requirements of constructing and equipping the road. Plaintiff in error testified that this was done with Mrs. Cross' knowledge and approval, and she in her testimony does not deny that he talked with her frequently about the construction of the road and told her he was advancing money and from what sources he was raising it. The money for this purpose was derived from the sale of the property left by Cross and that of Mrs. Cross. She denied knowing of the sale and disposition of her own property at the time it was disposed of, although she testified that the business was so complicated and difficult that she did not understand all that plaintiff in error told her about it. Some money was first raised by mortgaging a part of the Nebraska land. Afterwards this land was sold, Mrs. Cross signing and acknowledging the deeds. She does not deny that she read the deeds and knew their contents. Plaintiff in error testified that from the property of Mrs. Cross and her husband's estate he derived the sum of \$236,498.73, all of which he expended in the management of Mrs. Cross' business and that of her husband's estate, including the building of the railway. He

testified that he not only spent this amount for said purposes but also additional amounts from his own funds, making the amount he had paid out, in all, \$342,950.88, between the time he took charge of the work and the time he was compelled by poor health to give it up, in September, 1911. The evidence tends to show that at the last mentioned date all of the right of way between Godfrey and Jerseyville had been secured, paid for and graded, and that all the material to be used for the road and power house, including rails and ties, was on the ground and the rails laid as far as the Bluff line crossing below McClusky, and that practically all the overhead work had been done as far as McClusky, which is about eleven miles from Godfrey.

The plaintiff in error continued to live at his home in St. Louis until May, 1911, when he moved with his family to Jerseyville, Illinois, and for several months resided there with his mother-in-law. He had been for some time failing in health, and in September, 1911, on account of poor health,—apparently a nervous breakdown,—he left for Los Angeles, California. When he left for the west he turned over the power of attorney to Mrs. Cross and from that time on had nothing further to do with her business affairs. Some time in September, 1911, a receiver was appointed for said electric railway company, and after he left Illinois the insurance company in St. Louis of which he had been president, being insolvent, was taken in charge by the public authorities of Missouri and its affairs put in process of liquidation. The evidence shows that at this time he had converted practically all of the property belonging to the Cross estate, and also Mrs. Cross' own property, into money and had expended it in some manner. He testified positively that he had paid it all out in connection with the business of said electric railway except \$100,925, which he had invested, with the consent and approval of his mother-in-law, in stock of the St. Louis Fire Insurance Company, of which he at the time was president.



The evidence in the record tends to show that at the time plaintiff in error went west there was also due and unpaid from \$115,000 to \$125,000 (the evidence is not clear as to the exact amount) of the \$175,000 indebtedness owed by Cross at his death, and that Mrs. Cross' name had been signed by herself, on the plaintiff in error's advice or by the plaintiff in error under his power of attorney, to additional indebtedness, amounting to about \$275,000. At the time he left Jerseyville for California, in 1911, he was on friendly terms with his mother-in-law and the record shows that there was interchange of friendly letters between them after he left. During his absence she wrote him a letter asking him to make a statement of his account so far as he could, showing just how the affairs stood. He wrote a letter in response giving at some length a statement of the accounts connected with her own and her husband's estate. It appears from the record that this account was not at all complete. He stated in the letter that a part of his papers forwarded to him at Denver, Colorado, had been so injured by water while in the basement of her house at Jerseyville that it was impossible for him to tell anything from them. He closed the letter by saying, however, that if she desired any further information he would be very glad, so far as possible, to send it to her. It seems that after he remained in Los Angeles a time he returned as far east as Denver, and was living at the time of the trial at Phoenix, Arizona, apparently in fair health. The evidence disclosed, without controversy, that when he moved to Jerseyville he brought many of his private papers and books along with him, including check book stubs and other like memoranda; that when he left his mother-in-law's home for California they were packed in her cellar, and all or many of them were wet by the flooding of the cellar, caused by the breaking of the water pipes. He had these papers shipped to him in Denver, and testified they had been so injured by the water that they were of

very little value as memoranda, as he could not decipher them, and on that account he had destroyed many of said papers and books before the trial. Mrs. Cross testified that these papers were in her basement and were damaged by the water there. Other witnesses testified as to the injury done by the water. One witness who saw them after they were in Denver stated that most of the papers had been rendered quite illegible. Plaintiff in error, however, on the trial, testified at length in regard to the moneys he had received while acting as attorney in fact in charge of the business of Mrs. Cross for herself and as executrix, and how he paid it out, giving items of receipts and disbursements in detail. He stated that he had prepared a list, from which he testified, as to these receipts and disbursements as best he could from his recollection and the memoranda that he had on hand, so that he had made a complete typewritten memorandum of them. Such receipts and disbursements, itemized, were stated at length and in detail in his testimony as abstracted. They cover many pages, and show, as we find in the record, some 117 different items of receipts and 310 of disbursements. His testimony as to these items was not controverted by any other witness.

We find no evidence in the record that proves with that degree of certainty required in criminal cases, that the defendant fraudulently converted to his own use, without the consent of his employer, the property or funds in question. The most that the evidence, other than his testimony, shows or tends to show, is that he received all the proceeds from the sale of Mrs. Cross' property, both her own and that of her husband's estate. There is very little testimony, outside of his own, to show what he did with these funds. If his testimony as to how he expended this money is to be believed, and it was expended with the consent and sanction of Mrs. Cross, it cannot be said that he fraudulently converted it to his own use. The verdict of the jury was

that he was guilty of embezzling property of the value of \$49,960. No evidence was offered in behalf of the People tending to support the averments of the fifth and sixth counts of the indictment. On cross-examination of plaintiff in error it appeared that a check for \$49,950 was given to him December 29, 1910, by the St. Louis Fire Insurance Company for \$55,500 worth of bonds of the electric railway, he being then president of each of said corporations. Plaintiff in error testified that he gave back his check to said fire insurance company for \$50,000, and that this transfer was merely a matter of book-keeping in settling up the accounts of the St. Louis Fire Insurance Company when that company took over the Century Fire Insurance Company of Des Moines, Iowa; that it had nothing to do with Mrs. Cross' affairs; that it was his (plaintiff in error's) own personal affair. It is manifest from a study of the record before us that the jury returned their verdict under the sixth count of the indictment on account of the giving of this check for \$49,950, on the ground that that was the consideration for the sale of the \$55,500 worth of the electric railway bonds to the St. Louis Fire Insurance Company. The \$10 difference between this check and the sum mentioned in the verdict must have been a mistake made by the jury in fixing the amount. There is no other single transaction shown in the record that would make this difference between the \$49,960 and \$49,950. It is not at all probable that the jury arrived at this value of the property by adding together a large number of the smaller sums that came into his possession. It seems to be conceded by counsel for the People that the jury based their verdict on the transaction concerning this check for \$49,950 on the theory that plaintiff in error admitted that he sold \$55,500 of the electric railway bonds to the St. Louis Fire Insurance Company, for which he received said company's check, payable to himself, for \$49,950, and that he converted this check to his own use. His own evidence is

not clear on this point. He started to explain in answer to some of the questions during the cross-examination, but counsel stopped him and told him to answer yes or no. On re-direct examination he was not asked to explain this transaction more fully. There is no testimony in the record, outside of his, that touches in the slightest manner on this transaction. He did not state who owned this \$55,500 worth of bonds of the electric railway at the time he received this check, and there is no testimony in the record from which any satisfactory conclusion could be drawn as to who was the owner. This sixth count charges him with converting \$50,000 of the first mortgage bonds of this electric railway company. In plaintiff in error's testimony as to this transaction he was not asked and did not state as to whether this \$55,500 worth of bonds were first mortgage bonds or not. They were simply denominated "bonds" of that company. - Mere proof of the receipt of funds and failure to account therefor is not sufficient, in itself, to show embezzlement by an agent or servant. There must be other evidence of the conversion. (1 McClain on Crim. Law, sec. 639; *People v. Wyman*, 102 Cal. 552.) Plaintiff in error testified positively that at the time he took charge of the business for Mrs. Cross the St. Louis Fire Insurance Company was in excellent financial condition and that it was doing a fine business. Counsel for the State do not point out any evidence in the record, and we have found none, that in any way contradicts his testimony as to the financial condition of said company at that time.

Counsel for plaintiff in error insist that the record does not present any satisfactory proof that he converted to his own use any of the property that came into his hands by reason of his appointment by Mrs. Cross as her attorney in fact, to manage and control her own property and that of her husband's estate; that the only basis for this conviction is that he received the property and neglected to make a full statement of account therefor to his principal

before he was indicted, but that while on the stand testifying in this case he did make a full and complete statement of account, showing the money received and how it had been disbursed; that he stated repeatedly while on the stand that he had not converted any of the property, moneys or funds of Mrs. Cross to his own use, and that the strongest inference that can be drawn from his testimony in the case is that he did not show satisfactorily what he did with the check of the St. Louis Fire Insurance Company for \$49,950. Counsel for the People seem to assume in their briefs that on this record the conviction was justified because it was clearly shown that plaintiff in error had received all this property and turned it into money and had not accounted for its disbursement. They have not, however, attempted to point out in their briefs wherein plaintiff in error made false statements on the witness stand as to the receipts or disbursements of the money, and so far as we can ascertain there is no evidence in the record that contradicted him in any way as to the disposition he made of the proceeds of such property.

Counsel for plaintiff in error argue that the business affairs of Andrew W. Cross at his death were so badly involved and the attempt to construct the electric railway by him and his associates was so serious a financial blunder that it was impossible for anyone to protect his estate and continue the construction of the road in a successful business manner, and that plaintiff in error, in attempting to do so, attempted the impossible, and not only was compelled to put in all the proceeds from Mr. and Mrs. Cross' property, but also, under the burden of the responsibility, became a physical wreck; that most of his acts were done with Mrs. Cross' consent and approval, and that he is to be pitied and sympathized with, rather than punished, for having honestly attempted the impossible. Counsel for the People, on the other hand, apparently argue that plaintiff in error not only used bad business judgment in attempt-

ing to construct this road and manage the business affairs committed to him under the power of attorney, but that on account of his own financial embarrassment he used a large amount of funds that came into his hands under said power of attorney to help out the St. Louis Fire Insurance Company, of which he was president, thus, in effect, converting the same to his own use without Mrs. Cross' sanction or approval. Which view is correct need not in this case be decided. Even if the theory of the State be correct as to plaintiff in error's connection with the management and disposition of the property in question, he cannot be convicted under this indictment without proof, beyond a reasonable doubt, that he fraudulently converted to his own use, as charged in the indictment, some of the money or property thus turned over to him. The mere depositing of the proceeds of the notes, bonds and stocks that thus came into his hands to his own private account does not prove that he was guilty of embezzlement or fraudulent conversion. The record shows, beyond doubt, that everyone connected with any of his transactions mentioned in the testimony knew that he was acting under a power of attorney from Mrs. Cross and that she gave him full authority to act for her. Beyond question, according to her own testimony, Mrs. Cross herself knew that he was using in some manner the proceeds obtained from selling her own property as well as from selling the property of her husband's estate, and she concedes that he repeatedly talked with her about the construction of the railroad and what he was doing in connection therewith but that she did not fully understand it. The only point upon which she disagrees with him is as to whether she sanctioned the use of any of the proceeds of the property committed to his care for the purchase of stock in the St. Louis Fire Insurance Company. Manifestly, however, as conceded by counsel for the People, plaintiff in error was not found guilty in this case because he had thus invested in said stock. He was convicted be-

cause of the \$49,950 check of the St. Louis Fire Insurance Company, drawn to him personally. He was not asked by counsel on either side as to what he did with this check. It is not shown, as we have stated before, that it was given in payment of bonds belonging to Mrs. Cross. No attempt was made to show that he embezzled or converted to his own use this check or its proceeds. Even if it be conceded that the \$55,500 of bonds of the electric railway company in this transaction were her property or belonged to her as executrix, she did not deny the authority of plaintiff in error to sell them, and there is nothing in her testimony to show that these bonds were sold without her consent. Indeed, she did not in any way refer in her testimony to the \$55,500 worth of bonds. He cannot be convicted in this proceeding for embezzling the proceeds of bonds, as neither in the indictment nor the bill of particulars is he charged with that offense. On an indictment for embezzling bonds a conviction cannot be had merely on proof of the embezzlement of proceeds derived from sale of the bonds. *Goodhue v. People*, 94 Ill. 37; *Lory v. People*, 229 id. 268; *People v. Cronkrite*, 266 id. 438.

The only basis for the conviction of plaintiff in error, under the sixth count, for the conversion of these bonds is his own testimony. He denied that this transaction had anything to do with Mrs. Cross' business affairs, and there is no direct testimony in the record contradicting him on this point. The general rule undoubtedly is that positive testimony of a witness, uncontradicted and unimpeached,—either by positive testimony or by circumstantial evidence, either intrinsic or extrinsic,—cannot be disregarded, but must control the decision of a court or jury. (*Quock Ting v. United States*, 140 U. S. 417.) It is true that the rule admits of exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be con-

tradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. (*Podolski v. Stone*, 186 Ill. 540; *Kennard v. Curran*, 239 id. 122.) But neither court nor jury can willfully or through mere caprice disregard the testimony of an unimpeached witness. (*Larson v. Glos*, 235 Ill. 584.) Waiving the question as to whether, in the state of the record in this case, this judgment should be reversed because of the mistake of \$10 made in the amount of the check which must have served as a basis for the jury's verdict, we cannot see how the evidence justified plaintiff in error's conviction even for the proper amount of the check. His testimony as to this check is, as we have seen, uncontradicted by any other testimony in the record. It is not so inherently improbable or so contrary to any facts he states as to justify the court or jury in disregarding his testimony on that question. Furthermore, construing his testimony most strongly against him, as argued by counsel for the State, there is no evidence upon which to base the conclusion that these bonds were the property of Mrs. Cross, either personally or as executrix.

Counsel for plaintiff in error insist that he was wrongly indicted in Jersey county, in this State; that he was living in St. Louis, Missouri, at the time this power of attorney was executed and did most of the business under that power while he resided in Missouri, and that therefore, if he was guilty at all, he must be tried in Missouri; that it was not his duty to make an accounting to Mrs. Cross in this State. The law is that the venue of an indictment charging an embezzlement consisting of a failure to account should be laid in the county and State where the accused was under an obligation to account. (*Kossakowski v. People*, 177 Ill. 563.) While it is true that the power of attorney did not state that it was plaintiff in error's duty



to account to his principal at her home in Jerseyville, and there is no direct testimony of an agreement to that effect, the method of carrying on the business between them, as found in this record, is of such character as to justify the conclusion that both parties interested thought it was his duty to account to her at her home. Much of the business was transacted in Jerseyville, and, indeed, at the time he turned over to her his appointment as attorney in fact and dropped all connection with her business affairs he had been making his home for several months, as he himself testified, at Mrs. Cross' house, and it was his clear duty to account to her there. We do not think the trial court erred in ruling that the venue was properly laid.

Counsel for plaintiff in error further insist that no demand was made for an accounting from plaintiff in error by Mrs. Cross or anyone acting for her. Unless the statute under which an indictment for embezzlement is framed requires a demand for an accounting as a constituent element of the offense a demand is not necessary. (10 Am. & Eng. Ency. of Law,—2d ed.—995; 2 Bishop's New Crim. Law, sec. 373; *State v. Porter*, 26 Mo. 201; *Commonwealth v. Tuckerman*, 76 Mass. 173; *People v. Gordon*, 133 Cal. 328; *State v. New*, 22 Minn. 76; *State v. Tompkins*, 32 La. Ann. 620; see, also, *Kossakowski v. People*, *supra*.) This indictment is based upon two sections of the Criminal Code, namely, sections 74 and 75. (Hurd's Stat. 1913, p. 820.) Neither of these sections requires a demand.

Counsel further insist that the trial court erred in refusing to permit the introduction of certain receipts offered by plaintiff in error while on the stand. At the time they were offered it was contended by counsel that such receipts corroborated plaintiff in error as to how he had paid out money for many of the items of disbursements. As between principal and agent, receipts given to the agent for payments made by him in his principal's business are competent evidence of the amounts paid. (*Ballance v. Frisby*,

2 Scam. 63; *People v. Gerold*, 265 Ill. 448; *Given v. Gould*, 39 Me. 410; *Sherman v. Crosby*, 11 Johns. 70.) A written receipt, if properly identified, is *prima facie* evidence of the truth of the recitals which it contains. (Jones on Evidence,—2d ed.—sec. 492.) As we understand the offer of proof as to these receipts the court should have admitted them in evidence.

Section 74 of division 1 of the Criminal Code (Hurd's Stat. 1913, p. 820,) which is one of the sections on which this indictment was based, provides that a person is guilty thereunder who "embezzles or fraudulently converts to his own use, secretes with intent to embezzle or fraudulently convert to his own use," moneys, goods or property, etc. Section 75 also specifies the actual embezzlement or fraudulent conversion and the taking or secreting with intent so to do. The first instruction given on behalf of the People told the jury that "whoever embezzles or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods or property delivered to him," etc., shall be deemed guilty of larceny. The second instruction contained practically the same wording. There was no evidence in the record that tended to support the charge that plaintiff in error had secreted with intent to embezzle or fraudulently convert to his own use and no count in the indictment to that effect. The only evidence that tended in the slightest degree to show his guilt was that he had embezzled or fraudulently converted to his own use. Under the reasoning of this court in *Goodhue v. People*, *supra*, it was error to give these instructions. Furthermore, we think the instructions were improper, under the holdings of this court, because they contained legal propositions inconsistent with and not founded upon the facts in the case. *Hayner v. People*, 213 Ill. 142; *Johnson v. People*, 197 id. 48.

Counsel further complain of certain instructions of the People, because they told the jury, in terms, that plaintiff

in error could be found guilty if they believed, from the evidence, that he had converted any money or property of Mrs. Cross, ignoring entirely any reference to the money and property specified in the bill of particulars. These instructions were misleading and erroneous in that regard. When a bill of particulars has been filed in a case the instructions should confine the consideration of the jury to evidence supporting the charges stated in the bill of particulars. *McDonald v. People*, 126 Ill. 150; *Waidner v. Pauly*, 141 id. 142; *Township of Lovington v. Adkins*, 232 id. 510.

Counsel further argue that certain instructions given for the People were erroneous, in that they told the jury that it was their duty to decide the case "solely on the evidence and the instructions of the court," etc.; that the jury are the judges not only of the facts but of the law in criminal cases, in this State. Our views on this point have been repeatedly stated by this court. (*Mullinix v. People*, 76 Ill. 211; *Davison v. People*, 90 id. 221; *Wohlford v. People*, 148 id. 296; *People v. Campbell*, 234 id. 391.) While these last instructions perhaps were not carefully worded, we do not think they were so misleading as to justify a reversal.

Other errors are urged as to the wording of certain instructions, and while possibly some of the criticisms of counsel for plaintiff in error may be justified, we deem none of the other points raised of sufficient importance to require our consideration.

The judgment of the circuit court will be reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

*Reversed and remanded.*

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, vs.  
VOL E. RICHARDSON, Admr., Appellee.

*Opinion filed October 27, 1915.*

1. *INHERITANCE TAX*—*meaning of word "corporation" in the Inheritance Tax law.* The word "corporation" in the Inheritance Tax law is broad enough to include municipal corporations of every character, and the language purports to apply to every corporation not afterwards exempted in the statute.

2. *SAME—nature of an inheritance tax.* An inheritance tax is not a tax upon the property but is a condition which the State imposes upon the privilege of succeeding to the ownership of the property, and hence where an estate escheats to a county an inheritance tax thereon is not a tax on the property of the county but is a limitation on the right of the county to succeed to the title.

3. *SAME—when an inheritance tax accrues.* That portion of an estate which under the Inheritance Tax law vests in the State accrues immediately upon the death of the decedent, and all questions concerning it must be determined as of the date of the decedent's death.

4. *SAME—Inheritance Tax law applies to property escheated to county.* The Illinois Inheritance Tax law applies to the property of an intestate transferred to a county by the Statute of Escheat.

5. *ESCHEATS—Statute of Escheat is part of the intestate laws of the State.* The intestate laws of the State are those laws which govern the devolution of the estates of persons dying intestate, and include all applicable rules of the common law in force in this State and all statutes applicable to such estates, including the Statute of Escheat.

APPEAL from the County Court of Jefferson county;  
the Hon. A. D. WEBB, Judge, presiding.

P. J. LUCEY, Attorney General, (CHESTER H. FARTHING, and LESTER H. STRAWN, of counsel,) for the People.

JOEL F. WATSON, and CONRAD SCHUL, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

Rebecca E. Galbraith died August 14, 1911, intestate, leaving no husband, descendant, ancestor or next of kin and leaving real estate and personal property of the value of

\$23,356.93. The debts and cost of administration amounted to \$2695.50. The property, under the statute, escheats to the county of Jefferson, in which the decedent lived and where the real estate is situated.

The question in this case is whether there is due from the county an inheritance tax on the property. The statute imposes the tax upon the transfer of any property by will or by the intestate laws of this State to persons, institutions or corporations not specifically exempted. It is insisted that the county does not come within the meaning of the statute because it is an involuntary public corporation established as a part of the government of the State; that its property is not private property but public property, and therefore exempt from taxation. The word "corporation," used in the Inheritance Tax law imposing the tax, is broad enough to include municipal corporations of every character, and the language purports to apply to every corporation not in the statute afterwards exempted. Section 28 is the only section exempting from the tax, and that applies only when the beneficial interest in any property or its income shall pass by grant, gift or otherwise to any hospital, religious, educational, bible, missionary, trust, scientific, benevolent or charitable purpose, or to any trustee, bishop or minister of any church or religious denomination, to be held and used exclusively for the religious, educational or charitable uses and purposes of such church, religious denomination, institution or corporation. The exemption of the property of the county from general taxation is provided by section 2 of chapter 120 of Hurd's Statutes, and it only exempts property used exclusively for the maintenance of the poor, swamp or overflowed lands unsold by the county, public buildings belonging to the county, and the grounds on which such buildings are erected, not exceeding in any case ten acres. We have held that an inheritance tax is not a tax upon the property but is a condition which the State imposes upon the right or privilege of succeeding to the

ownership of the property, and that that portion of the estate which under the Inheritance Tax law vests in the State accrues at the same time the estate vests, immediately upon the death of the decedent, and that all questions concerning it must be determined as of the date of the decedent's death. (*Northern Trust Co. v. Buck & Rayner*, 263 Ill. 222; *In re Estate of Graves*, 242 id. 212.) The tax is not a tax upon the property of the county but a limitation upon the county's right to succeed to the title. The right to the amount of the tax vested in the State on the decedent's death, and that amount never became the property of the county. Whether the tax should be imposed upon public municipal corporations was a question for the consideration of the legislature, and no reason exists for giving a construction to the language used different from its natural meaning, which includes such corporations.

It is further argued that this estate having escheated to the county of Jefferson there has been no transfer of the estate within the meaning of the Inheritance Tax law. The transfers on which the tax is imposed, as far as this case is concerned, are those by will or by the intestate laws of this State. The transfer was not by will. If it were, there would be very little ground for the argument that the tax was not due. The intestate laws of the State are those laws of the State which govern the devolution of the estates of persons dying intestate and include all applicable rules of the common law in force in this State. (*Billings v. People*, 189 Ill. 472.) They include, also, all statutes applicable to such estates. The Statute of Escheat in express terms refers only to any person who should die seized of any real or personal estate without any devise. It therefore refers only to intestate property and is necessarily a part of the intestate laws of the State.

"The tax imposed upon transfers of property by the statute applies to the transfer of the property of an intestate to a county by escheat. The judgment of the county court was

to the contrary, and it is therefore reversed and the cause remanded, with instructions to assess and fix the amount of the inheritance tax.

*Reversed and remanded, with directions.*

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MARY J. OSMOND, Appellee, vs. NELLIE EVANS, Appellant.

*Opinion filed October 27, 1915.*

1. FRAUD—*party alleging fraud must state the facts relied upon.* A party alleging fraud in a partition sale must state in the pleadings the facts relied upon to show fraud, and mere conclusions of the pleader, without averments as to the facts, are not sufficient.

2. JUDICIAL SALES—*when sale of three tracts en masse will not be set aside.* Where the land offered at a partition sale consists of the homestead tract, a woodland tract and two eighty-acre tracts having no buildings, and the tracts are first offered separately but no bid is made except for the woodland tract, and a bid is then received for the homestead and the two eighties *en masse*, it is not error to refuse a bid at a higher price per acre for the homestead alone, where it appears that no bids could be had on the eighty-acre tracts if detached from the homestead, and it is not shown that the amount bid was not a fair value for the land or that more would be realized at a re-sale.

3. SAME—at a partition sale the land cannot always be sold to best advantage in separate tracts. While land offered at a partition sale should first be offered in separate tracts, yet if the property cannot be sold to best advantage in separate tracts it should be offered in other combinations and sold in such a way as to bring the best results.

4. SAME—*party seeking re-sale should make an advance bid or guarantee against loss.* A party seeking to set aside a partition sale should make an advance bid or bring the money into court or should give a bond against loss on re-sale.

5. SAME—*what is not ground for setting aside sale.* The mere fact that land is sold *en masse*, without proof of injury, is not ground for setting aside a partition sale; nor is mere inadequacy of price sufficient, unless it is so gross as to raise, of itself, a presumption of fraud.

APPEAL from the Circuit Court of Kendall county; the Hon. MAZZINI SLUSSER, Judge, presiding.

BENJAMIN F. HERRINGTON, for appellant.

MCDUGALL & CHAPMAN, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill filed by appellee June 1, 1914, in the circuit court of Kendall county, for the partition of four tracts of land in that county. After the pleadings were settled a decree of partition was entered and commissioners were appointed, who reported it impossible to partition the land, and a decree was entered ordering the master to sell. Accordingly sale was made and decree entered confirming the same. From that decree this appeal was prosecuted.

The land in question was formerly owned by Wilson Evans. Mary J. Osmond, the appellee, is the only child of Evans, and the appellant was his second wife and widow. By various deeds made after Evans' death Mrs. Osmond owned an undivided two-thirds of the land and Mrs. Evans an undivided one-third. The first and second tracts of land contained 80 acres each, the third 52.84 acres, (being known as the homestead and upon which all the farm buildings were located,) and the fourth 17.55 acres of woodland. The master in his report of sale stated that he first offered the four tracts separately and received no bids, except one of \$60 an acre for the woodland and one for \$176 an acre for the homestead, but that he could get no bids on the 80-acre tracts unless they were combined with the homestead tract, and therefore he was compelled, in order to sell all the property, to dispose of the homestead and the two 80-acre tracts together; that after offering said tracts singly and in every other combination, and all four together, and receiving no further bids, he finally sold the homestead and the two 80-acre tracts together for \$134 per acre and the woodland separately for \$60 an acre. The total amount of said sale (\$29,573) was more than two-



thirds of the appraised value. When the master made his report of sale objections were filed by appellant, and after a hearing by the court they were overruled. At this hearing the testimony was mainly presented in the form of affidavits. The commissioners appraised the two eighties at \$180 and \$160 an acre, respectively, the homestead at \$200 an acre and the woodland at \$75 an acre. One witness offered by appellant stated that he believed the homestead was worth \$200 an acre, the 160 acres from \$160 to \$180 an acre and the woodland from \$75 to \$100 an acre. The other witness for appellant stated that the homestead was worth \$176 an acre, and one 80-acre tract from \$160 to \$165 per acre and the other from \$140 to \$145 per acre. Six witnesses testified for appellee that the land was sold for what it was fairly worth; that the two 80-acre tracts would not sell to any advantage except in connection with the homestead, as all the farm buildings were on that tract.

Appellant contends that appellee and her counsel fraudulently combined together to cause the bidding at the sale to be "chilled" and thereby prevent a sale to persons not parties to the partition suit. She contends, from her sworn exceptions to the master's report and the testimony of two witnesses, that while the master first offered the four tracts separately, he afterwards refused to receive a bid for the home place from her, or another person bidding for her, at \$176 per acre. The occurrences at the sale, according to her contention, were somewhat as follows: That after each of the four tracts was put up separately and no bid offered except for the woodland tract, the master then offered the other three pieces together; that the bids started at \$120 an acre, and after several bids, finally one was made on behalf of appellee for \$134 per acre; that as the master was about to declare the property sold to appellee, appellant, through her counsel, bid \$175 an acre for the homestead tract, which the master refused to receive, as he also did a bid of \$176 made by another person for appellant,

saying, in substance, that it was too late, as he had already offered the property separately and would not again so offer it. The six witnesses for appellee disagreed with the statement that the master refused to receive this bid. They corroborate the statement as made by the master in his report, that after this bid of \$176 was made he tried to get bids for the two 80-acre tracts and nobody would bid on them separately or the two together, so that if he sold all the property at that time it was necessary for him to sell the homestead with the two 80-acre tracts.

Appellant further contends that Mrs. Osmond tried to discourage the bidding by saying, so that all persons present could hear, that she would not allow the homestead to be sold separately from the two 80-acre tracts. Appellant further contends that a conspiracy by the appellee and her counsel to prevent bidding by other parties and to injure appellant is shown by the history of a previous master's sale of this property in this same proceeding, which had been set aside by the court by agreement of all parties. The only proof on this matter outside of the exceptions sworn to by appellant is the bare statement in the record that there was such a sale. Appellant, in her sworn exceptions, states that at such former sale counsel for appellee stated that his client would allow her two-thirds interest to remain as a loan at five per cent, and as a result of this offer she (appellant) bid in the entire tract at \$154 an acre, but when she afterwards tried to make arrangements with appellee and her counsel for the loan, they refused to carry out their promise and she was unable to raise the money to comply with her bid, and hence it was necessary to have the first sale set aside and the property re-advertised. Conceding, for the purpose of the argument, that the matters contained in the exceptions are true, we do not see, on this statement of the facts, how appellant was fraudulently injured by appellee in making any bid she desired at the second sale or making other arrangements to

raise the money if she desired to stand by her original bid. A party alleging fraud must state in his pleadings the facts relied upon to show fraud. The mere conclusions of the pleader, without averments as to facts, as in these exceptions to the report of sale, will not support allegations of fraud. (*Harrigan v. County of Peoria*, 262 Ill. 36, and cases there cited.) Furthermore, we find nothing in this record, except these conclusions in said exceptions, that in the remotest way suggests fraud on the part of appellee or her counsel or that their actions in any way discouraged or "chilled" bidding, as insisted by appellant.

Appellant further insists here, as in the court below, that the sale should be set aside because the master refused to accept appellant's bid for the home place and sold said home place and the two eighties *en masse* to appellee. The purpose of a partition sale, when the land cannot be partitioned, is to sell all of the property at the highest price possible. It would be of little use to the parties interested to sell one or two of these tracts alone, even though they were sold for a higher price, if the other tracts could not be sold at all unless in conjunction with the home place. It has been repeatedly held by this court that in partition sales the land must be first offered in separate tracts, but it is also the settled rule that if the property cannot be sold to the best advantage in separate tracts then it should be offered in other combinations and sold in such a way as to bring the best results, taking all the property together. (*Phelps v. Conover*, 25 Ill. 309; *VanValkenburg v. Trustees of Schools*, 66 id. 103; *Fairman v. Peck*, 87 id. 156; *Ward v. Ward*, 174 id. 432.) It has also been held that even though the property has been sold *en masse* without offering the different tracts separately, the sale will then only be set aside on the ground of fraud or when someone has been prejudiced by such sale. (*Ross v. Mead*, 5 Gilm. 171; *Gillespie v. Smith*, 29 Ill. 473; *Kerfoot v. Billings*, 160 id. 563.) There are no such circumstances connected

with this case to justify setting aside the sale as were shown in *Mansfield v. Wallace*, 217 Ill. 610, and *Haggerty v. Haggerty*, 268 id. 295. Moreover, there is no satisfactory proof in this record that the property did not sell for what it was fairly worth. While it is the duty of the master in making a sale to offer the land in parcels and the sale will be set aside on a proper showing if he fails to follow this rule, yet the mere fact of selling *en masse*, without proof of injury, will not justify the court in setting aside said sale. (*Bowen v. Bowen*, 265 Ill. 638.) There is no proof in this record that if this sale were set aside the property would bring a higher price. While appellant and her two witnesses state that in their opinion some of the property was worth more than it brought, that is a mere opinion without satisfactory showing that the property would be sold for more if this sale were set aside. The record shows that this last sale was fully advertised, not only by the master but by counsel for appellant. This court has held repeatedly that where a sale of this kind is objected to, the objectors asking a re-sale should bring the money into court, or make an advance bid, or give a guaranty or bond that there will be no loss on a re-sale. (*Quigley v. Breckenridge*, 180 Ill. 627, and cases cited; *Wilson v. Ford*, 190 id. 614; *Kiebel v. Leick*, 216 id. 474; *Abbott v. Beebe*, 226 id. 417; *Schulz v. Hasse*, 227 id. 156.) No such offer or guaranty of any kind was made on the hearing in the court below. For this reason, if for no other, the trial court did not err in refusing to set aside the sale. It is true that the price for which the property was sold was considerably less than that fixed by the appraisers, but "real estate rarely ever brings its full value at a forced sale for cash in hand." (*Allen v. Shepard*, 87 Ill. 314.) Inadequacy of price in the sale of lands is not sufficient, alone, to set aside a sale unless it is so grossly inadequate as in itself to raise the presumption of fraud. (*Heberer v. Heberer*, 67 Ill. 253; *Quick v. Collins*, 197

id. 391; *Abbott v. Beebe*, *supra*.) "Public policy requires stability in all judicial sales and that they should not be disturbed for slight causes. To do so would impair that confidence so essentially necessary to induce persons to become purchasers when real estate is offered for sale under a judgment or decree of a court." *Conover v. Musgrave*, 68 Ill. 58; *Abbott v. Beebe*, *supra*.

We find no error in the record. The decree of the circuit court will therefore be affirmed. *Decree affirmed.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. IKE ISRAEL, Plaintiff in Error.

*Opinion filed October 27, 1915.*

1. CRIMINAL LAW—*what constitutes duplicity in criminal pleading.* To constitute duplicity in criminal pleading there must be joined in the same count different, separate and distinct crimes committed at different times.

2. SAME—*what constitutes a single offense.* Where goods of different kinds and belonging to different owners are stolen at the same time and from the same place the crime is but a single offense against the public although there may be as many trespasses as there are separate owners; and this same rule applies to buying or receiving stolen property knowing it to be stolen.

3. SAME—*what may be omitted in an indictment for receiving stolen goods.* Under section 239 of the Criminal Code an indictment for receiving stolen goods need not state the name of the thief and the time and place where the goods were stolen.

4. SAME—*what will not be assumed in prosecution for receiving stolen goods.* In a prosecution for receiving stolen goods it will not be assumed that the articles were bought and received at different times and at different places, where the same does not appear on the face of the indictment.

5. SAME—*what necessary to sustain conviction on the testimony of a thief.* To sustain a conviction by the evidence of a witness who is a confessed thief and who has been convicted repeatedly of infamous crimes, the evidence in the record, considered as a whole, should leave no reasonable doubt of defendant's guilt and the trial should be conducted without prejudicial error.

6. SAME—*defendant is entitled to instruction as to presumption of innocence.* In every case where the material facts are in controversy the defendant is absolutely entitled to have the jury properly instructed as to the law on the presumption of innocence, and such instruction should not be refused because a part of it is a repetition of the same principles stated in other instructions.

7. INSTRUCTIONS—*what will make an instruction objectionable.* An instruction is objectionable which contains mere statements of abstract propositions of law on other subjects not specially applied to the case and which assumes the truth of the facts on which they are based.

8. WITNESSES—*a witness cannot be impeached on immaterial matter.* A witness cannot be impeached upon immaterial matter, and it is immaterial whether one accused of receiving stolen goods had purchased junk from the thief previous to the larceny involved in the prosecution.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. ADELOR J. PETIT, Judge, presiding.

NORTHUP, ARNOLD & FAIRBANK, and LOUIS GREENBERG, for plaintiff in error.

P. J. LUCEY, Attorney General, MACLAY HOYNE, State's Attorney, ARTHUR R. ROY, and FRANCIS E. HINCKLEY, for the People.

Mr. JUSTICE DUNCAN delivered the opinion of the court:

At the July term, 1913, of the criminal court of Cook county an indictment of two counts was returned against plaintiff in error, Ike Israel, herein designated as the defendant. The first count charged a larceny of the property in question. The second count charged, in substance, that on January 15, 1913, in Cook county, Illinois, the defendant feloniously and unjustly, for his own gain and to prevent the owners from again possessing their property, did buy, receive and aid in concealing 263 pounds of brass, of the value of fourteen cents each pound, and other metals, (describing them and valuing them,) of the goods and chattels of Sam Cohen and Louis Cohen, partners do-

ing business as Cohen Bros., then lately before feloniously stolen, taken and carried away from the said Sam Cohen and Louis Cohen by a certain evil-disposed person, and 1900 pounds of brass, of the value of thirteen cents each pound, and other metals, (describing them and valuing them,) of the goods and chattels of Solomon Silverstein, then lately before feloniously stolen, taken and carried away from the said Solomon Silverstein by a certain evil-disposed person, the said Ike Israel then and there well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, contrary to the statute and against the peace and dignity of the same People, etc. The defendant was tried on a plea of not guilty, and the jury found him "guilty of receiving stolen property knowing the property to be stolen," in manner and form as charged in the indictment, and found the value of the property so received to be \$70. No motion was made to quash the indictment. After motions for new trial and in arrest of judgment were overruled defendant was sentenced on the verdict, and he has sued out a writ of error from this court.

The undisputed facts upon which the indictment was based are, that Cohen Bros. and Silverstein, during January, 1913, were separately engaged in buying and selling large quantities of junk, consisting of copper, brass and other metals, and separately occupied one-half of the floors of the two-story brick building at 1647 West Polk street, Chicago, as a warehouse for said business. On the night of January 14, 1913, Jacob Bosky and Joe Greeny forcibly broke and entered said warehouse and feloniously stole and carried away large quantities of said junk, some of which belonged to Cohen Bros. and the remainder thereof to Silverstein. They also at the same time stole Cohen Bros.' wagon and Silverstein's horse, with which they hauled away the stolen junk to a junk dealer near Elston avenue named Mintz and there unloaded it, and disposed of the

horse and wagon by abandoning it near Mintz's shop. Mintz refused to buy the junk because he thought it was stolen. They then employed a teamster, Harry Ackerman, for \$6, to haul it to a second junk dealer not far away, who refused to buy it for the same reason. After agreeing to pay Ackerman \$9 more, they induced him to haul it to the defendant's junk shop, at 636 Orleans street, where they arrived about nine o'clock A. M., January 15, and unloaded it in defendant's shop.

The defendant contends that the second count of the indictment is fatally defective, and that the judgment should have been arrested because that count charges two separate offenses, which should have been included in separate counts; and that both counts are fatally defective for the further reason that each count is lacking in material averments and cannot be aided by averments in the other count.

Where goods belonging to different owners are stolen from a building at one and the same time it constitutes a single offense against the public. To constitute duplicity in criminal pleading there must be joined in the same count different, separate and distinct crimes committed at different times. Where the offense is one act, fully completed at the same time and place, it is but one crime, however many different kinds of property may be stolen. There is no good reason why such an act may be said to constitute more than one crime because there are two or more separate owners of the property stolen. A crime is an offense committed against the public and not merely against a private citizen. Where articles of property are stolen at one and the same time and at the same place, from several separate owners, there are as many wrongs committed against private citizens as there are separate owners, but they are trespasses when so considered. As against the public such an act is but one offense or crime. To hold otherwise, a thief proven guilty of grand larceny might escape punishment therefor in the penitentiary by the split-



ting up of the State's cause of action into two or more separate suits for petit larceny, or he might be convicted two or more times for grand larceny for but one act or offense if the property stolen from each individual should be of sufficient value. (*Lorton v. State*, 7 Mo. 55; *Nichols v. Commonwealth*, 78 Ky. 180; *State v. Larson*, 85 Iowa, 659; *People v. Johnson*, 81 Mich. 573; *State v. Newton*, 42 Vt. 537; *Furnace v. State*, 153 Ind. 93; *State v. Mjelde*, 29 Mont. 490; *State v. Mickel*, 23 Utah, 507; *Wilson v. State*, 45 Texas, 76; *Fulmer v. Commonwealth*, 91 Pa. St. 503; *Waters v. People*, 104 Ill. 544.) In *State v. Nelson*, 29 Me. 329, and in *Smith v. State*, 59 Ohio St. 350, it is held that the same rules apply for buying or receiving stolen property knowing it to be stolen, and we know of no reason why the same rule should not apply under our statute. In *Freeland v. People*, 16 Ill. 380, it was said: "In the same act of feloniously taking a quantity of goods, the party may, in law, be guilty of as many crimes as there are separate owners of the goods stolen and may be punished as for so many distinct larcenies. If a person steals a horse, saddle and bridle at the same time, by the same act he may commit, in law, three several larcenies." The same language was quoted in the case of *Nagel v. People*, 229 Ill. 598, but the real question for decision in the instant case was not up for decision in those cases and the language there used may be regarded as mere dictum. The doctrine announced in those quotations was, in part at least, expressly overruled in the case of *Waters v. People*, *supra*, where it was said (p. 547): "When it is but one act, fully completed at the same time, there can be no duplicity, however many or different kinds or articles of property are stolen, and it being but a single larceny, it is not error to so charge it in one count in the indictment."

Under section 239 of our Criminal Code, (Hurd's Stat. 1911, p. 805,) in an indictment for receiving stolen goods it is not necessary to state the name of the thief and the

time and place where the goods were stolen, and it is not necessary to aver more definitely than was done in this indictment the time and place where the stolen property was bought and received by the defendant. It will not be assumed that the articles were bought and received at different times and at different places where the same does not appear on the face of the indictment. The indictment charges but a single offense and is good, after verdict at least, and the evidence offered under it tended to prove but a single offense.

The State contends that the defendant bought the entire load of junk of Bosky and Greeny and paid them \$70 knowing it to be stolen, while the defendant claims that he was away from his shop when Bosky and Greeny brought the junk and unloaded it there, and that when he returned he refused to buy the junk and did not buy it, and that he ordered them to take it away, and that they did take it away from his premises with a horse and wagon, except a few pieces that fell out of the old gunny sacks in which it was contained, and that Bosky paid Frank Colmer for helping him to re-load it. The defendant's contention is supported *in toto* by his own testimony and by the evidence of the witnesses Louis Israel, his brother, Frank Colmer, a teamster of the Taft-Short Contracting Company, and Fred Bendel, engaged in the motor transportation business, the last two of whom are apparently disinterested witnesses and in no way related to the defendant. The only positive testimony supporting the State's claim was that of Bosky, its chief witness, who previous to the burglary and larceny disclosed in this case had been convicted a number of times for the infamous offense of grand larceny. He also admitted that he had previously stated out of court, and that he had testified in court, that he did not sell the junk in question to the defendant, and his own evidence shows he was very bitter towards the defendant for not standing by him and aiding him while he was being prose-

cuted. His testimony, however, did support the State's contention, and if true the defendant was also an accessory to the burglary and larceny of the goods in question. His evidence as to the defendant's buying the junk in question is corroborated to some extent by the evidence of Silverstein, Ackerman and two police officers, none of whom were present when it is claimed the junk was bought by the defendant. Silverstein was present when the defendant's premises were searched the second time, and identified certain automobile copper castings that were found covered up with other junk in barrels on defendant's premises, which he testified belonged to him. The police officers testified that the first time they searched his premises he told them that he did not buy any junk on the morning of January 15, and one of them testified that he told them no one had brought any there that morning. They also testified that the junk identified by Silverstein as his own was found covered up in barrels with metal shavings and other junk. Ackerman testified that Bosky and Greeny paid him \$10 at a saloon near the defendant's shop and told him to wait there until they collected the money for the junk and they would pay him the balance due him; that shortly afterwards he followed them to the defendant's shop and told him that Bosky and Greeny owed him \$5 for the hauling, and that the defendant told him they were gone and had gone out of his back way. The defendant testified that the six pieces of copper identified by Silverstein belonged to him and not to Silverstein, and contradicted the police officer who testified that the defendant made the statement that no one brought any junk to his place on January 15, and also the evidence of Ackerman.

While it is true that a defendant may be convicted by the evidence of a witness who is a confessed thief and who has been convicted of an infamous crime repeatedly, yet to sustain such a conviction the evidence in the record, when considered as a whole, should leave no reasonable doubt of

his guilt and the trial should be conducted without prejudicial error. The verdict of guilty in this case cannot be sustained without a finding, not only that the testimony of Bosky against the defendant is true, but also that the testimony of the defendant and his brother and his other two witnesses, the last three of whom were directly contradicted by no one save Bosky, was false and that all four of them were perjurers. The only other evidence inconsistent with the testimony of defendant's three witnesses aforesaid is that of Silverstein in identifying six pieces of the copper junk as his own that were found in the defendant's possession, and taking his testimony as absolutely true, the defendant might still be innocent and have obtained the copper innocently from some other source. We are therefore forced to the conclusion that the evidence in this record does not prove, beyond a reasonable doubt, that the defendant is guilty as charged.

In every case where the material facts are in serious controversy, as in this case, the defendant is entitled to have the jury properly instructed as to the law on the presumption of innocence, when such law is properly presented to the court by written instructions to be given to the jury. The court committed error in refusing to give defendant's offered instruction No. 5, which is one of the usual stock instructions upon the presumption of innocence, and there is no contention by the State that it is objectionable in any way except that a part of it bearing on other subjects was a repetition of the same principles stated in other instructions. The only instruction given by the court bearing on the law relating to the presumption of innocence is the People's instruction No. 7, "that the rule of law which clothes every person accused of crime with the presumption of innocence and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt is not intended to aid anyone who is, in fact, guilty of crime to escape, but is a humane provision of the law, intended, as far as human

agencies can, to prevent an innocent person from being convicted." The defendant's refused instruction No. 3, also contained a correct statement of the law on the presumption of innocence. The instruction, however, was properly refused because it was vitiated by the addition thereto of this further instruction: "In order to convict him of the crime charged in the indictment every material fact necessary to constitute such crime must be proved beyond a reasonable doubt, and if the jury entertain a reasonable doubt upon a single fact or element necessary to constitute the crime, then it is your duty to give the prisoner the benefit of the doubt and acquit him." *Williams v. People*, 166 Ill. 132.

The court was warranted in refusing to give the defendant's offered instruction No. 2 because it did not correctly define the term "reasonable doubt." (*Little v. People*, 157 Ill. 153.) It was also objectionable because it contained mere statements of abstract propositions of law on other subjects not specially applied to the case, making the instruction argumentative, and objectionable as assuming the truth of the facts on which they were based.

The court also properly gave instructions on circumstantial evidence because there was sufficient of such evidence in the record on which to base them.

The last assignment of error is untenable for the reason that a witness cannot be impeached upon immaterial matter, and it was immaterial whether Bosky knew Mintz or had sold him junk previous to the larceny in question.

For the reasons above indicated the court erred in not granting a new trial. The judgment of the court is reversed and the cause remanded.

*Reversed and remanded.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. NICHOLAS KIELCZEWSKI, Plaintiff in Error.

*Opinion filed October 27, 1915.*

1. CRIMINAL LAW—*rule as to reversal for insufficient evidence.* The Supreme Court will not reverse a judgment of conviction in a criminal case on the ground of insufficient evidence, unless, from a consideration of the whole evidence in the cause, a reasonable doubt of guilt arises.

2. SAME—*what circumstance tends to corroborate testimony of prosecuting witness.* The fact that the prosecuting witness, who testifies that he kept the two men who robbed him in sight from the time they robbed him until they were arrested, was able to, and did, point out to the police officers the particular pockets of the men in which certain of the articles taken from him would be, and were, found, is a circumstance tending to corroborate his other testimony.

3. SAME—*when the jury cannot disregard testimony as to age.* Where the two defendants charged with robbery are asked by the court as to their ages and one answers that he is twenty-one and the other that he is twenty-two, the jury are not authorized, by considering the appearance of the defendants, to find in the verdict that the defendants are between the ages of ten and twenty-one years and are about the age of twenty years, and it is error to sentence the defendants to imprisonment in the State reformatory.

4. SAME—*when error cannot be corrected by directing court to enter proper sentence.* Where the trial court submits the question of the ages of the defendants in a robbery case to the jury on the statements of the defendants that they are, respectively, twenty-one and twenty-two years old, the finding of the jury that the defendants are between the ages of ten and twenty-one years and are about the age of twenty years cannot be regarded as surplusage by the Supreme Court, and the error in sentencing the defendants to the State reformatory cannot be cured by reversing the judgment and directing the court to sentence the defendants according to the evidence.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. ADELOR J. PETIT, Judge, presiding.

THOMAS E. SWANSON, and ELWYN E. LONG, for plaintiff in error.

P. J. LUCEY, Attorney General, MACLAY HOYNE, State's Attorney, and GEORGE P. RAMSEY, for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The plaintiff in error was found guilty by a jury in the criminal court of Cook county of the crime of robbery and was sentenced to imprisonment in the Illinois State Reformatory.

The record has been brought to this court by writ of error. The indictment charged the plaintiff in error and Frank Wasky with robbery from the person of one John Pyrcznski by taking from him certain moneys described in the indictment and one pin of the value of fifteen cents. The evidence for the People consisted of the testimony of John Pyrcznski and the policemen Bernard J. Love and James J. Gannon. John Pyrcznski testified that about one o'clock in the morning of October 3, 1914, he met the plaintiff in error and Frank Wasky in the city of Chicago, on Thirty-first street, and was seized by the plaintiff in error, who held his hands behind his back while Wasky took from his pockets two dimes, two nickels, a match-box, a handkerchief and a stick-pin; that he went around the corner about forty feet, where he met two policemen, to whom he made complaint; that the plaintiff in error and Wasky were in his sight until the time he met the policemen; that the policemen stopped the plaintiff in error and Wasky and searched them; that he pointed out the pocket of the plaintiff in error in which the handkerchief was placed and the pockets in which the match-box and money were placed, and that they were found in those pockets. Bernard J. Love testified that he met Pyrcznski, who claimed he had been robbed; that the plaintiff in error and Wasky crossed the street and were stopped by him and identified by Pyrcznski as the two men who robbed him; that they denied the robbery; that Pyrcznski showed him

the pockets where the handkerchief, the money and the match-box had been placed; that he searched the plaintiff in error and Wasky and found a part of the money on the plaintiff in error and part on Wasky; that he found the match-box in the side pocket of the plaintiff in error and the handkerchief in the top pocket of his coat, as pointed out by Pyrcznski; that plaintiff in error claimed the match-box, handkerchief and money belonged to him, and both he and Wasky denied the robbery or that they had ever seen Pyrcznski. James J. Gannon testified that he was with officer Love when the plaintiff in error and Wasky were arrested; that Pyrcznski charged them with the robbery, which they denied; that the defendants were searched and the various articles were found in the pockets pointed out by Pyrcznski.

The plaintiff in error testified that on the night in question he and Wasky had been at a dance in Keyser's Hall, at Archer and Twenty-ninth street; that they left the hall and were going south on Racine avenue from Thirty-first street; that when they were near Thirty-second place the two policemen stopped them; that the policemen searched them and took from him the match-box, a handkerchief and a twenty-five-cent piece; that the match-box, money and handkerchief were his own property, and that he had seen Pyrcznski a few times before that. A brother of plaintiff in error testified that he had seen the plaintiff in error have the handkerchief a week before the robbery; that the handkerchief was given to the plaintiff in error as a present, and that he saw his mother wash the handkerchief. The mother of the plaintiff in error was called as a witness, and through an interpreter refused to testify, and refused to say that she had washed the handkerchief or that it was the property of the plaintiff in error.

Frank Wasky testified that he was with the plaintiff in error at the dance and they left the dance-hall and started for home; that they were met by the police officers and



Pyrznski, who stopped them; that the policemen searched their pockets and took a dime from him; that neither he nor the plaintiff in error took any of Pyrcznski's property or robbed him and he never saw Pyrcznski until he came up with the officers.

The question of the guilt or innocence of the plaintiff in error depended upon the truthfulness of the witnesses. If the testimony of Pyrcznski that the plaintiff in error and Wasky robbed him, and that he kept them in sight from the time of the robbery until they were arrested, was true, the verdict was right. He could not be mistaken as to the fact and no circumstances were proved casting any serious doubt upon his credibility. The testimony of the two policemen that Pyrcznski was able to, and did, point out to them the respective pockets in which could be found, and were found, articles described by him as having been taken from him, tended to corroborate him. Against the evidence of guilt there was the denial of the accused and the testimony of the brother of the plaintiff in error respecting the handkerchief. The match-box and handkerchief were not mentioned in the indictment but were so connected with the crime therein charged that the fact of their being found in the designated pockets tended to prove the charge and to identify the robbers. It was the province of the jury to determine the credibility of the witnesses, and the established rule is that this court will not reverse a judgment of conviction unless the court can say, from a consideration of the whole evidence, that there was a reasonable doubt of guilt. (*Miller v. People*, 229 Ill. 376.) Upon such consideration of all the evidence it can not be said that there was such reasonable doubt, and the court therefore did not err in denying the motion for a new trial.

The jury found the plaintiff in error guilty, with this further finding: "And we further find from the evidence that the said defendant is between the ages of ten and

twenty-one and that he is about the age of twenty years." The only basis for a finding as to the age of the plaintiff in error was the following: After the evidence was all before the jury the court asked the attorney for the defendants what were the ages of his clients, and the attorney replied that he did not know,—they could answer for themselves. The court then asked the plaintiff in error how old he was, and he answered twenty-one. The court then asked the defendant Wasky how old he was, and he answered twenty-two. The verdict of the jury was the same as to each of the defendants and the sentence was the same as to each. If, in fact, the defendants were twenty-one years of age or upward, the sentences were not only contrary to the evidence but contrary to the law and the policy of the State, which does not contemplate or permit male persons twenty-one years of age at the time of their conviction to be sentenced to the Illinois State Reformatory. (*People v. Smith*, 253 Ill. 283; *People v. Stowers*, 254 id. 588.) Section 10 of the State Reformatory act provides that in all criminal cases tried by jury in which the jury shall find the defendant guilty, they shall also find, by their verdict, whether or not the defendant is between the ages of ten and twenty-one years, and if the jury shall find the defendant to be between the ages of ten and twenty-one years, they shall find, as nearly as may be, the age of the defendant. That section was intended to apply to minors, to give them the benefit of the objects for which the reformatory was established, and in a prosecution where age is not an element of the crime and there is no question that the accused is an adult the jury need not find his age, (*Herder v. People*, 209 Ill. 50; *People v. Liedecker*, 258 id. 395;) but where there is a question whether the accused is an adult or a minor it must be submitted to the jury. In this case the court submitted the question of age to the jury and entered judgment on the verdict contrary to the only evidence in the record.

The argument to sustain the finding and judgment is, that the plaintiff in error having become a witness in his own behalf, his appearance, demeanor and conduct while on the witness stand were evidence in the case, and the jury might determine that his statement was not true and fix his age from his appearance. The fact that the plaintiff in error was a witness, so that the jury saw him on the witness stand, did not enable the jury to determine his age from appearances with any more certainty than if they had seen him in the court room when not a witness. It is true that appearances approximately indicate the age of a person and as between the extremes of youth and old age are quite reliable. In any case, appearances may be accepted and weighed for what they are worth. Anyone knows, however, that there are remarkable differences in the appearances of persons of the same age, and as between twenty and twenty-one no one would accept appearances, alone, as a reliable standard. Undoubtedly, the appearance of an alleged minor may be considered in determining his age, but there must be some proper rule of evidence as to how it shall be proved. A defendant whose material interests are affected by a finding as to his age has a right to a review of that question, and there could be no review, no matter how utterly unfounded the conclusion of the jury might be, if the rule contended for were adopted. The rule of evidence is that a witness, after describing the appearance of a person as best he can, may give an opinion of his age. (1 Elliott on Evidence, sec. 677.) From appearances a qualified witness may estimate the age of a given individual by stating what effect the observed appearances have produced on his mind. (3 Chamberlayne on Modern Law of Evidence, sec. 2045.) This court has applied the general rule that jurors cannot make up their verdict on any disputed fact from their own individual observation, (*Seaverns v. Lischinski*, 181 Ill. 358,) and in *Wistrand v. People*, 213 Ill. 72, it was held that, whether

the defendant did or did not testify, the law did not allow the jury to fix his age by inspecting him. In that case no crime was committed unless the accused was more than sixteen years of age, and it was decided that the fact of the defendant being present in court on the trial did not justify the jury in finding him to be above that age, but the place and manner of punishment is material to an accused and the same rule must apply. In the case of *People v. Davidson*, 240 Ill. 191, it was held that a witness may give his opinion as to the age of a person from his appearance, but the witness must first describe the appearance of the individual and then may state his opinion, which is essential to preserve any right of review concerning the value of the opinion. The sentence, perhaps, was more favorable to the plaintiff in error than if he had been sentenced to the penitentiary, but the laws and policy of the State and the legitimate objects of the reformatory are involved, and the court will not affirm a judgment contrary to such laws and policy on the ground that the complaining individual was not injured.

It is suggested that the judgment in this case may be reversed with a direction to the court to sentence the plaintiff in error to the penitentiary in accordance with the evidence. If the verdict had been that the plaintiff in error was twenty-one years of age and the court had sentenced him to the reformatory the course suggested might properly be adopted, but the statute requires the court, in proper cases, to instruct the jury in regard to finding the ages of persons on trial for criminal offenses, (*Sullivan v. People*, 156 Ill. 94,) and the court having considered this a proper case for the submission of the question to the jury, the finding was one prescribed by the Reformatory act and cannot be ignored as surplusage. The court took the verdict as a basis for the sentence and the judgment was in accordance with the verdict. It cannot be said that the

court entered an improper sentence on the verdict which can be corrected by directing the proper sentence.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. MORRIS L. FOX, Plaintiff in Error.

*Opinion filed October 27, 1915.*

1. STATUTES—*what may be considered in determining intention of the legislature.* In determining the intention of the legislature it is proper to consider the occasion and necessity for the law, the previous condition of the law on the subject, and the defects, if any, in the former law which were intended to be remedied by the later enactment.

2. SAME—*when courts are not confined to the literal meaning of words used.* The literal language of a statute may be departed from and words may be changed, altered, modified or supplied, or omitted entirely, if such course is necessary to obviate any repugnancy between the language used and the intention of the legislature as gathered from a consideration of the whole act and the previous condition of legislation on the subject.

3. CRIMINAL LAW—*when a prisoner out on bail must be tried.* The provision of section 18 of division 13 of the Criminal Code, that a person admitted to bail "shall be entitled, on demand, to be tried at some term commencing within four months after he has been admitted to bail," means that he must first make demand for trial to set the statute in operation, and must then be tried at some term of court commencing not more than four months after making the demand, unless the court, on the showing required by the statute, continues the case to the next term.

4. SAME—*when allegation of ownership of burned goods is not material.* An allegation as to the ownership of the goods is not material in an indictment for burning goods to injure an insurance company, as the gist of the offense is the burning of the goods, whether owned by the accused or some other person, with intent to injure the insurer, and a variance between the allegation and proof as to such ownership is not fatal.

5. SAME—*when rule as to former jeopardy does not apply.* The rule that a person cannot be twice tried or put in jeopardy for the

same offense has no application where two separate and distinct crimes are committed by one and the same act.

6. *SAME—arson and burning goods to injure insurer are distinct offenses.* An acquittal on the charge of arson in burning a building is not a bar to a prosecution for burning goods to injure an insurance company, even though the goods and the building were destroyed in the same fire, as the crime of burning goods to defraud the insurer is not a part of the crime of arson but is a distinct offense.

7. *SAME—jury must be accurately instructed where chief witnesses are accomplices.* Where the chief witnesses against the accused are accomplices or self-confessed criminals in the employ of the State or of corporations interested in securing a conviction, it is important that the jury be properly and accurately instructed as to the law.

8. *SAME—when instruction as to reasonable doubt is misleading.* An instruction telling the jury that the doubt upon which they may acquit must be a reasonable doubt and not merely one of speculation or probability, and that the State is not required to prove the defendants guilty beyond all doubt, is misleading in leaving the impression that the jury might convict the defendants even though they thought there was a probability they were not guilty.

9. *SAME—when error cannot be disregarded.* It is essential to the preservation of the system of trial by jury that the jury be correctly instructed as to the rules of law governing them in weighing the evidence and determining the guilt or innocence of the accused, and no error of the court in performing its duty in that respect can be overlooked or disregarded, unless it is of such a character that it clearly appears the error could not have affected the verdict of the jury.

10. *SAME—jury should not be told to consider surrounding circumstances appearing on trial.* An instruction which is intended to inform the jury what things to consider in determining which witnesses are more worthy of credit should not include "the surrounding circumstances appearing on the trial."

11. *SAME—right of People to an instruction as to convicting upon circumstantial evidence.* The People are entitled to an instruction informing the jury of their right to convict upon circumstantial evidence if they believe, beyond a reasonable doubt, that circumstances have been proven to be true which cannot reasonably be accounted for except on the theory that the defendants are guilty of the crime charged.

12. *SAME—when court does not err in calling witness.* If the testimony of a witness, because of his connection with the trans-

action, is material in a criminal case but his relations with the parties and his testimony in other cases have been such that the State's attorney is not in a position to vouch for his credibility, it is not an abuse of discretion for the court to call him as a witness.

13. *SAME—what evidence admissible as tending to show guilty knowledge.* In a prosecution for burning goods to injure the insurer, evidence showing the association of the accused, after the fire, with persons implicated therein, the paying of attorneys for furnishing them services, the procuring of bail for some of them, and other similar activities, may be introduced as tending to show guilty knowledge, but matters wholly disconnected with the case should be excluded.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. JOHN M. O'CONNOR, Judge, presiding.

BRUNDAGE, LANDON & HOLT, and JOHN J. BEILMAN,  
(ROBERT N. HOLT, of counsel,) for plaintiff in error.

P. J. LUCEY, Attorney General, MACLAY HOYNE, State's  
Attorney, C. H. LINSOTT, FRANK JOHNSTON, JR., JAMES  
C. O'BRIEN, and JOHN PRYSTALSKI, for the People.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Plaintiff in error was indicted, tried and convicted in the criminal court of Cook county of the crime of burning goods, wares and merchandise with the intent to injure certain insurance companies. It was charged in the indictment that on March 7, 1912, plaintiff in error, David I. Felsenthal, Moe Rosenberg, Nathan Spira and Benjamin Fink, (otherwise called Ben Finkleberg, or Ben Franklin,) unlawfully, willfully, maliciously and feloniously set fire to a certain lot of woolen and cotton clippings, goods, wares and merchandise in a building known as 902-904 South Morgan street, in the city of Chicago, with the intent to injure and defraud the Ætna Insurance Company and other insurance companies therein named, in which the burned property was insured against loss by fire. Only plaintiff in error and Felsenthal were placed

on trial on the indictment. Spira was convicted under another indictment for a similar offense, Rosenberg plead guilty and Fink was granted immunity by the State's attorney, and both he and Rosenberg were used as witnesses on the trial. The jury acquitted Felsenthal but found the plaintiff in error guilty as charged in the indictment. Motions for a new trial and in arrest of judgment were made and overruled, judgment was entered on the verdict and plaintiff in error was sentenced to the penitentiary under the Indeterminate Sentence act. He has sued out this writ of error to reverse the judgment of the lower court.

The various errors assigned and relied upon for reversal will be considered in their order.

It is first insisted that the court erred in denying the plaintiff in error's motion to be set at liberty under section 18 of division 13 of the Criminal Code. (Hurd's Stat. 1913, p. 880.) It appears from the record that on April 3, 1913, the plaintiff in error, together with Felsenthal, Rosenberg and Fink, were indicted for the offense of burning goods with intent to injure insurance companies, under an indictment known as No. 815. Under this indictment plaintiff in error was arrested and gave bail on April 8, 1913. He was again indicted for the same offense on the present indictment on January 31, 1914, along with the other defendants and Nathan Spira, this indictment being known as No. 2507. The only difference between the two indictments was the adding of Nathan Spira as a defendant in the last indictment. No *capias* was issued on the last indictment, and plaintiff in error was never arrested on it but voluntarily appeared on April 24, 1914, and gave bail. On April 3 and 27, May 29 and June 3, 1914, being at the March, April, May and June terms, respectively, of the court, plaintiff in error appeared and demanded a trial on the first indictment, No. 815. On July 6, at the July term, 1914, plaintiff in error entered his motion to be discharged for the want of prosecution.



The court took the motion under advisement, and on July 9, 1914, before the court passed upon the motion to be discharged, the State's attorney entered a *nolle prosequi* to this indictment. Plaintiff in error demanded trial on the other indictment on April 3 and 27, May 29, June 16 and July 28, 1914, of the March, April, May, June and July terms of the court, respectively, and on September 2, 1914, during the August term of that court, moved that he be discharged for want of prosecution under this indictment. The court denied his motion and a jury was empaneled and plaintiff in error was put upon trial, which resulted in his conviction.

Section 18 of division 13 of the Criminal Code, under which plaintiff in error claimed the right to be discharged for want of prosecution, is as follows: "Any person committed for a criminal or supposed criminal offense, and not admitted to bail, and not tried at some term of the court having jurisdiction of the offense commencing within four months of the date of commitment, or if there is no term commencing within that time, then at or before the first term commencing after said four months, shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner, or unless the court is satisfied that due exertion has been made to procure the evidence on the part of the People, and that there is reasonable grounds to believe that such evidence may be procured at the next term, in which case the court may continue the case to the next term. If any such person shall have been admitted to bail for an alleged offense other than a capital offense, he shall be entitled, on demand, to be tried at some term commencing within four months after he has been admitted to bail, if there is a term of court within that time at which he may be tried; if not, then at the first term after the expiration of said four months: *Provided*, that if the court shall be satisfied that due exertions have been made to procure the evidence on

behalf of the People, and that there is reasonable ground to believe such evidence may be procured at the next term or at some term to commence within seventy (70) days thereafter, the court may continue the cause to such term."

No claim is made that the delay in this case was caused by the plaintiff in error, or that any showing of reasonable ground for a continuance to the next term or some succeeding term was made by the State's attorney, as provided by the statute, so that the question is squarely presented as to the date from which the time is to be computed when the accused has been indicted, arrested and admitted to bail and a demand made for a trial pursuant to the statute. It is contended by counsel for plaintiff in error that he was entitled to be discharged if not granted a trial, on demand, at some term of court commencing within four months of the time he was admitted to bail, no matter when the demand for trial was made, and that the court accordingly erred in denying his motion to be discharged. It is insisted on behalf of the People that the provisions of the statute have not been violated, inasmuch as plaintiff in error was placed upon trial at a term of court commencing within four months after the date when he first demanded trial on either of the indictments, the argument being, that as the terms of the criminal court of Cook county commenced on the first Monday of each month and plaintiff in error first demanded trial on April 3, 1914, at the March term of that court, the time being computed by months instead of by terms of court, as it was under the prior statute, (Rev. Stat. 1874, chap. 38, par. 438,) the statute was complied with when the plaintiff in error was placed upon trial at any term of court commencing on or before August 3, 1914, that being a term of court commencing within four months from the time he first demanded trial on either of the indictments.

The August term, 1914, of the court commenced on the first Monday in the month, or on August 3, 1914.

Plaintiff in error was placed upon trial on September 2, 1914, or during the August term of that court and at a term commencing within four months after the date of his demand for trial, so that if the theory of the prosecution is correct and the time is to be computed from the date of demand for trial and not from the date of the admission to bail, the statute has been complied with in this case. The difficulty with the question is as to the proper meaning and intent of the words "on demand." Construing section 18 of the statute in connection with the other sections bearing on the practice under our Criminal Code and the various steps in a criminal prosecution, and taking into consideration that the section in question is an amendment of a prior law on the subject, it must be conceded that a demand by the accused is necessary to set in motion the statute under which he would be entitled to a discharge. If the accused makes no demand for trial and the State's attorney does not set the case for trial the case will be carried along on the criminal docket from term to term. If, however, the accused desires a trial, he has the right, under the law, to make a demand, and it is then the duty of the court to grant him a trial either at the term the demand is made or at some term commencing within four months or at the next term, unless the court is satisfied at such subsequent term that there are grounds for continuing the case to the next term, as provided by the statute in question. This section of the statute was amended to its present form in 1895. The former statute read as follows: "Any person committed for a criminal or supposed criminal matter, and not admitted to bail and not tried at or before the second term of the court having jurisdiction of the offense, shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner. If such court, at the second term, shall be satisfied that due exertions have been made to procure the evidence for and on behalf of the People, and

that there are reasonable grounds to believe that such evidence may be procured at the third term, it shall have power to continue such case till the third term. If any such prisoner shall have been admitted to bail for a crime other than a capital offense, the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the People of the State are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material." (Rev. Stat. 1874, p. 411.)

By the amendment of June 21, 1895, the provision for a trial "at or before the second term of the court" after the commitment, was changed to "at some term of court commencing within four months of the date of the commitment," etc., and the provision making a demand for trial necessary in all cases in which the accused had been admitted to bail was added. Under the amended act a demand for trial is necessary to set the statute in operation. Had it been the intention of the legislature that when once the statute was put in operation the time should be computed from the date of the admission to bail and not from the demand for trial, the provision for a demand for trial would seem to be wholly unnecessary, as it neither adds to nor subtracts from the requirements of the former statute as construed by this court. Even under the prior statute it was held the accused was not entitled to his discharge at the third term unless he appeared at each term in accordance with the provisions of his recognizance and was ready for trial, (*Gallagher v. People*, 88 Ill. 335,) so that the adding of the provision for a demand for trial as a condition precedent to putting the statute in operation added nothing to the statute unless it was intended that the time should be computed from that date. Nor does it seem reasonable, if a demand for trial is necessary to put the statute in operation, that when such demand is made it shall relate back to a time long before

the time when any such demand for trial was made. That such was not the intent of the legislature we think is clear when the provisions of the statute are read in the light of the previous condition of the law on this subject and the objects and purposes sought to be attained by the revision and enactment of the present statute.

The rule is elementary that the primary object of construing a statute is to ascertain and give effect to the true intent and meaning of the legislature in enacting it; that it is "the intention of the law-makers that makes the law." (*Hoyne v. Danisch*, 264 Ill. 467.) For the purpose of ascertaining and giving effect to this intention of the law-makers it is proper to consider the occasion and necessity for the law, the previous condition of the law on the subject, and the defects, if any, in such former law which were intended to be cured or remedied by the later enactment. Where the spirit and intention of the legislature in adopting the act are clearly expressed and its object and purposes are clearly set forth, the courts are not confined to the literal meaning of the words used, when to do so will defeat the obvious legislative intention and result in absurd consequences not contemplated or intended by it. In such cases the literal language of the statute may be departed from, and words may be changed, altered, modified and supplied, or omitted entirely, if necessary to obviate any repugnancy or inconsistency between the language used and the intention of the legislature as gathered from a consideration of the whole act and the previous condition of legislation upon that subject. (*Krome v. Halbert*, 263 Ill. 172; *Hoyne v. Danisch*, *supra*.) To give to the language of this act the literal construction contended for by plaintiff in error would not give effect to the intention of the legislature as manifest from a consideration of the whole act, and would lead to absurd consequences and public hardships never contemplated at the time of its enactment. What the legislature intended was

to secure to the accused a speedy trial as guaranteed by section 9 of article 2 of the constitution of 1870 and also to allow the People time in which to make preparation for such trial. A term of court commencing within four months either of the date of the commitment where the accused was unable to give bail, or the date of the demand for trial where the accused had been admitted to bail, was deemed sufficient for this purpose, the shorter time provided by the former statute having been tried and found unsatisfactory. But to give the statute the construction contended for by plaintiff in error would be to but increase and multiply the evils the revision and amendment of the statute were intended to rectify, for if, when more than four months have elapsed since the accused was admitted to bail without being brought to trial, the time for bringing him to trial must be computed from the date of his admission to bail and not from his demand for trial, then he must be tried at the term of court at which the demand for trial is made or be discharged from further prosecution on that charge. In the case of a person admitted to bail the statute in question provides that "he shall be entitled, on demand, to be tried at some term commencing within four months after he has been admitted to bail, if there is a term of court within that time," etc. It is true that in the language of the statute the accused is entitled to a trial within four months of the time he is admitted to bail, but if, with his consent or without demanding a trial, four months or the second term after which he is admitted to bail goes by, even if he should then make a demand for trial it would be impossible to grant him a trial as provided in the statute and the court would be obliged to discharge him. Such a construction of the statute would be entirely unreasonable, and it could only properly apply in cases where the accused makes a demand for trial at the same time he is admitted to bail.

We think that a demand for trial is necessary to set the statute in question in operation and until a demand for trial is made it is inoperative, and that consequently the term of court at which a defendant is entitled to be tried is a term commencing not more than four months after making the demand, and that the trial court did not err in so holding.

It is next insisted that there is a fatal variance between the allegation as to the ownership of the property in the indictment and the proof. The indictment alleges that the property is that of plaintiff in error and David I. Felsenthal, while the proof shows it was insured as the property of the D. I. Felsenthal Company, a corporation, and the loss was payable to the corporation. We do not regard the allegation as to the ownership of the property as material. The gist of the offense is the burning of property, whether owned by the accused or any other person, with the intent to injure the insurer. In *Mai v. People*, 224 Ill. 414, in speaking of the offense created by this statute, we said: "The offense \* \* \* consists in the willful and malicious burning of goods, wares, merchandise or other chattels which are at the time insured against loss by fire, with the specific intent to injure the insurer, and under the statute creating this offense the intent is the controlling element of the offense and must be alleged and proven." The ownership of the property is immaterial, and the allegation as to ownership could have been omitted, so long as the indictment alleged that the property burned was not that of the insurer, and the indictment still have been good under the statute. The allegation as to the ownership was surplusage and need not be proved as alleged. (Wharton on Crim. Pl. & Pr.—8th ed.—sec. 158; *State v. Sampson*, 157 Iowa, 257; *United States v. Howard*, 3 Sum. 12; *Nagel v. People*, 229 Ill. 598; *Clark v. People*, 224 id. 554.) A "variance, in criminal law, is not now regarded as material unless it is of such a substantive

character as to mislead the accused in preparing his defense or places him in a second jeopardy for the same offense." (1 Wharton on Crim. Evidence,—10th ed.—sec. 90.)

It is next insisted that the court erred in sustaining the demurrer to the plea of former acquittal and in refusing to allow plaintiff in error to introduce evidence for the purpose of sustaining such plea. It appears from the allegations of such plea and the evidence offered but not received in support thereof, that the plaintiff in error and David I. Felsenthal were indicted, tried and acquitted of the crime of arson in burning the building situated at 902-904 South Morgan street, in the city of Chicago. The said building was destroyed by the same fire in which the goods, wares and merchandise in question were destroyed which plaintiff in error and the others are charged with burning with intent to injure the insurance companies. It is insisted that inasmuch as the building contained the goods and both crimes were committed at one and the same time, there was, in fact, but one crime, and that the acquittal on the charge of arson was a bar to a prosecution of this offense. This is true only where the offense for which one is tried and acquitted or convicted is but one of the degrees of the same offense for which he is later attempted to be put upon trial. The case of *State v. Cooper*, 13 N. J. L. 361, cited by plaintiff in error, well illustrates this principle. In that case the accused was tried and convicted of the crime of arson. He was subsequently put upon trial for the crime of murder in burning a person to death in such fire, and it was there held that inasmuch as the statute made the crime of arson where a person was killed in the fire, murder, the latter being only a higher degree of the same offense, a judgment of conviction of the charge of arson was a bar to prosecution for a murder committed by such act. But this was true only because the New Jersey statute, which is similar



to ours in that respect, made the crime of arson murder where a person was killed in such fire. If our statute had made the crime of burning goods, wares and merchandise with intent to injure the insurer a part of the crime of arson, the cases cited by plaintiff in error would be in point. Under our statute the crime of arson and the crime of burning goods, etc., with intent to injure the insurer, are separate and distinct offenses. (*Mai v. People, supra; Elgin v. People*, 226 Ill. 486.) The evidence required to sustain the charge under one indictment would be entirely different from that required to sustain the charge under the other, although both the building and the goods might have been destroyed in the same fire. One who sets fire to a building not his own, with intent to destroy it, would be guilty of arson whether the building was insured or not, but the same would not be true with respect to the crime created by the statute in question. In order to constitute this crime proof must also be made that the property was insured and that the burning was with intent to injure the insurer. As said in *Mai v. People, supra*: "The differences between this offense and arson are: (1) It may be committed on personal property; (2) it may be committed upon one's own property; (3) it must be committed on property which at the time is insured against loss by fire, but not necessarily under a valid policy; (4) it must be committed with the specific intent to injure the insurer; (5) the punishment is imprisonment in the penitentiary not less than one nor more than ten years, whereas arson is punished, under our statute, by imprisonment in the penitentiary not less than one nor more than twenty years." The rule that a person cannot be twice tried or put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. (12 Cyc. 282; Wharton on Crim. Evidence,—10th ed.—sec. 578; 3 Greenleaf on Evidence,—15th ed.—sec. 36; *Spears v. People*, 220 Ill.

72.) Such was the situation presented by the fire in question, and the acquittal on the former charge of arson constitutes no bar to a prosecution for the crime charged in this indictment.

It is further insisted that the verdict of the jury is contrary to the evidence; that incompetent and immaterial evidence of a highly prejudicial character was admitted over the objections of plaintiff in error; that improper remarks were made by the trial court, and that improper and prejudicial instructions were given on behalf of the People. These several contentions are so closely related and depend so much on the character of the evidence introduced that they will be considered together.

The evidence shows that at the time of the fire plaintiff in error, Nate Silver, David I. and Harry Felsenthal and their father were the owners of all of the capital stock in a corporation known as the D. I. Felsenthal Company, having a capital stock of \$15,000, divided into one hundred and fifty shares of the value of \$100 each. Fifty shares of the stock were owned by the plaintiff in error, twenty-five shares by his brother-in-law, Nate Silver, and the rest of the stock by the three Felsenthals. The corporation was engaged in the business of dealing in cotton and woolen rags and clippings. Plaintiff in error does not appear to have had any great experience in this business. He resided at Racine, Wisconsin, where he was the owner of a company known as the Racine Iron and Metal Company. The Felsenthals had started the business of the D. I. Felsenthal Company and organized the corporation and originally owned all of the stock. They lacked the necessary capital to conduct the business, and through successive loans by plaintiff in error they became indebted to him, and he eventually took stock in the company by way of liquidating his indebtedness and to assist the Felsenthals in conducting the business. After plaintiff in error became interested in the company he from time to time ex-

tended credit to the company, so that at the time of the fire it was indebted to him something over \$32,000. The company carried insurance on the stock in the building to the amount of about \$31,500. The evidence on the part of plaintiff in error tends to show that at the time of the fire the stock of goods insured was worth approximately \$37,177.49, that there were accounts due the company amounting to about \$13,000, and that it had a balance to its credit of \$3000 in the bank. The evidence on the part of the People tends to show that all of the superior grades of clippings had been disposed of; that the stock on hand consisted of leavings worth anywhere from \$4000 to \$9000; that it was of a character that would not be depreciated much on account of the fire, and that the value of the salvage was approximately \$1200 to \$1300. The evidence further shows that shortly before the fire David I. and Harry Felsenthal severed their connection with the Felsenthal Company, and each of them went to work for a competing firm engaged in the same line of business, known as B. Cohen & Sons, on a salary and for a percentage of profits; that as a part of the arrangement by which they quit the Felsenthal Company it was agreed that company would cease to deal in woolen clippings, and that such woolen clippings as it did purchase were to be turned over to Cohen & Sons to be disposed of by them, the Felsenthal Company being allowed a profit of ten per cent on such sales, and that Cohen & Sons were not to deal in cotton clippings, and such cotton clippings as were purchased by Cohen & Sons were to be turned over to the Felsenthal Company and disposed of by the latter company, allowing to Cohen & Sons a profit of ten per cent on such sales. At the time the two Felsenthals withdrew from the Felsenthal Company they executed and delivered to the plaintiff in error their promissory notes for \$15,000 each, secured by their interest in the profits of the Cohen & Sons business, the net profits of which would amount approxi-

mately to twelve and one-half per cent each. At this time Cohen & Sons had the largest establishment of the kind in the west dealing in those materials and were doing a prosperous business. The fire occurred about 2:54 A. M., March 7, 1912. The building and its contents were badly burned and damaged by fire. The fire started with a dull explosion and seemed to break out on all three floors at substantially the same time. The testimony of the firemen and others who attended the fire was that it was of incendiary origin; that there was an odor of gasoline, and that they found empty gasoline cans in the building. The evidence was amply sufficient to establish the incendiary origin of the fire if the jury believed such testimony. At the time the fire started plaintiff in error was at his home in Racine, Wisconsin. He was first notified of the fire about half-past four in the morning by a telephone message from Nathan Spira, a public insurance adjuster, who has since been convicted for his complicity in a similar offense with Ben Fink and others. (*People v. Spira*, 264 Ill. 243.) Fink confessed that he started the fire in question, and claims that he was employed so to do by plaintiff in error and David I. Felsenthal. This was denied by both plaintiff in error and Felsenthal. Plaintiff in error came to Chicago on an early morning train. He was met at the station by Spira and went with him to the place of the fire, and subsequently placed the matter of the adjustment of the loss in Spira's hands. At the time of the trial plaintiff in error had adjusted his loss with certain of the insurance companies, realizing \$5250 on \$7250 worth of insurance, and there was still outstanding and unadjusted \$24,250 insurance on the property.

The evidence connecting the plaintiff in error with the offense consists of the confession of Ben Fink, a professional fire-bug; of the testimony of Rosenberg, Fink's associate, of Joseph Clark, a public insurance adjuster who had previously been convicted of complicity in a similar

offense, (*People v. Covitz*, 262 Ill. 514,) and of B. M. Levine, who was charged with a similar offense; of circumstances showing plaintiff in error's association, after his indictment, with Fink, Rosenberg, Spira, Levine and others of that character, and his contributing money to procure bail for some of them and to aid them in their defense; of his efforts made by and through them to secure copies of Fink's confession, and of affidavits made by them and others with relation to the matters of this fire. Plaintiff in error denied substantially all the testimony of these parties, and explained his efforts to secure the affidavits by showing that he desired to have them for use in the trial of suits which he had brought against the insurance companies.

The question of plaintiff in error's guilt or innocence was one purely for the jury on the conflicting evidence before them. While no great credence can be placed in the testimony of accomplices, especially when it appears that they are in the employ of the State or of insurance companies who are financially interested in securing a conviction of the accused property owner, and where the witnesses have been promised immunity and employment for giving their testimony in such cases, still convictions upon evidence largely of such character have been sustained by this court in *People v. Covitz*, *supra*, and *People v. Harris*, 263 Ill. 406; and where the jury were properly instructed as to the law, and there are corroborating circumstances, we would not feel at liberty to disturb the verdict of a jury based on such evidence. The law in this State is that the testimony of an accomplice is legal and competent evidence against one accused of crime, and that a conviction may be had on such testimony, alone, if it is of such a character as to satisfy the jury, beyond a reasonable doubt, of the guilt of the defendant. (*Gray v. People*, 26 Ill. 344; *Collins v. People*, 98 id. 584; *Rider v. People*, 110 id. 11; *Kelly v. People*, 192 id. 119.) It

is a character of evidence, however, that is subject to grave suspicion and should be acted upon with great caution, and only when the jury are satisfied from it, and from all the circumstances in evidence in the case, that it is true. (*Hoyt v. People*, 140 Ill. 588; *Campbell v. People*, 159 id. 9; *People v. Feinberg*, 237 id. 348.) It may be prompted by worthy or unworthy motives. In determining the credibility of such witnesses all of the facts and circumstances proven on the trial must be taken into consideration, and where the People's case rests upon testimony of this character,—of self-confessed criminals hiring themselves out to commit arson where they have no interest in the matter except to obtain payment from persons interested in having such a crime committed, and in obtaining immunity for themselves and escaping punishment for such offense and securing employment by testifying against others implicated with them when the crime is discovered,—it is highly important that the jury should be properly and accurately instructed as to the law of the case and the rules that are to guide them in weighing the evidence and passing upon the guilt or innocence of the accused. In this case, at the instance of the People, the court gave to the jury the following instruction:

"The jury are instructed that a doubt upon which you may acquit the defendants, or either of them, must be a reasonable doubt,—not merely one of speculation or probability. The State is not required to prove defendants guilty beyond all doubt. It is sufficient if the proof in this case convinces you beyond all reasonable doubt, and if the proof in this case convinces you beyond all reasonable doubt that the defendants are guilty, then you should find them guilty."

Great care should be exercised by the court in attempting, by an instruction, to define reasonable doubt. As stated by Mr. Chief Justice Shaw in the opinion in the celebrated *Webster case*, 5 Cush. 295, in defining reason-

able doubt: "It is a term often used, probably pretty well understood but not easily defined." In *People v. Barkas*, 255 Ill. 516, on page 527 of the opinion it is said: "The term 'reasonable doubt' has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life. It is doubtful whether any better definition of the term can be found than the words themselves." As stated in the foot-note in *Abbott v. Territory of Oklahoma*, 20 Okla. 119, as reported in 16 L. R. A. (N. S.) 260: "In many cases the advisability of giving the jury any definition of reasonable doubt is seriously questioned. It has been said that the phrase is its own best definition, and any attempt to define the phrase is likely to leave in the minds of the jury a reasonable doubt as to what a reasonable doubt is."

The defendant in a criminal case is entitled to be tried by a jury of twelve drawn from the voters of the county, and under our system of drawing juries the jurors are generally of widely different ages, occupations, experience and ability. They must all agree on a verdict. What would amount to a reasonable doubt or be defined as a reasonable doubt by one juror would not necessarily be so considered by another, and yet the defendant is entitled, under the law, to have just such a jury pass on his case, is entitled to the verdict of each member of the jury, and has the right to have each one resolve in his own mind whether or not, from all the evidence, he has what he deems to be a reasonable doubt of the defendant's guilt. While the courts have approved charges to the jury defining what is a reasonable doubt and have disapproved of others, it is very certain that in those jurisdictions in which the rule of reasonable doubt in criminal cases obtains, no court of last resort has approved an instruction which informed the jury that a doubt upon which the jury could acquit must not be one of probability. The instruction under consideration is loosely and inaccurately drawn,

but the meaning to be gathered from it is, that the jury should not acquit even if they thought there was a probability that the defendant was not guilty.

In *People v. Rosenberg*, 267 Ill. 202, an instruction in the exact language of the above instruction was given, with the exception that after the words "then you should find them guilty," the words "even though you may believe that there is a possibility that he is innocent" were added, and we there said of such an instruction: "This instruction set up as a standard of a reasonable doubt that it must not create a mere probability that the accused is not guilty. That which is probable is that which has more evidence for than against it; which inclines the mind to believe a fact although it leaves some room for doubt. Probability is that quality or state which presents an appearance of truth, and the instruction told the jury that when the testimony was weighed by them it would not suffice for an acquittal that it appeared probable the accused was not guilty. The instruction given to the jury was taken by them as a guide for their deliberation and was not the law. (*Smith v. State*, 92 Ala. 30; *Browning v. State*, 30 Miss. 656.) It cannot be said that the jury could not have reached any other conclusion. The defendant, Rosenberg, denied having any connection with the crime, and it was essential to a fair trial that his testimony should go to the jury and be considered by them under the correct rule concerning his right to an acquittal if there was a reasonable doubt of his guilt."

The omission of the last clause in the instruction in the case at bar in no way relieved the instruction from the criticism made of it in *People v. Rosenberg, supra*, or cured the vice in the first part of the instruction as pointed out in that case. It is essential to the operation and preservation of the system of jury trials that the jury should be correctly instructed as to the rules of law governing them in weighing the evidence and determining the



guilt or innocence of the accused, and no error of the court in performing its duty in that respect can be overlooked or disregarded unless it is of such a character that it clearly appears the error could not have affected the verdict of the jury. Any other rule would be destructive of the system of trial by jury. The instruction in this case, which told the jury that a mere probability that the accused were not guilty was not sufficient to create a reasonable doubt as to their guilt, was erroneous and should not have been given.

By another instruction the jury were told that they were the judges of the credibility of witnesses, and that they had a right "to determine, from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor or fairness or the lack thereof, the reasonableness or unreasonableness of the story told by them, their apparent intelligence or lack of intelligence, their interest in the outcome of the case, if any, as shown by the evidence, or the lack of such interest, and from all the surrounding circumstances appearing on the trial, which witnesses are more worthy of credit and to give credit accordingly." The criticism made of this instruction is, that it attempts to enumerate the elements which the jury are to consider in determining to which of the witnesses to give credit, and allows the jury to take into consideration "the surrounding circumstances appearing on the trial," which would include the conduct and demeanor of the defendants and other witnesses while in the court room during the trial, as well as other facts and circumstances not in evidence. Instructions of this character, advising the jury as to the things which may properly be considered by them in determining the credibility of witnesses, have been given and approved by this court in numerous cases, and so far as the objection made to it in this respect is concerned we think it is not well taken, but as to the latter clause, allowing the jury to take into consideration "all

the surrounding circumstances appearing on the trial," we think the instruction in this form was too broad. (*People v. Terrell*, 262 Ill. 138; *Purdy v. People*, 140 id. 46; *Vale v. People*, 161 id. 309; *People v. McGinnis*, 234 id. 68.) It should have been limited to the other facts and circumstances appearing in evidence. (*People v. Terrell*, *supra*.)

It is also insisted that the court erred in giving an instruction on the question of circumstantial evidence in which the jury were told that they had a right to convict the defendants upon circumstantial evidence, *alone*, if they believed, beyond a reasonable doubt, that circumstances had been proven to be true which were well connected, supported one another in a clear and lucid manner, and could not reasonably be accounted for except upon a theory that the defendants were guilty of the crime charged against them, etc. The criticism made of the instruction is, that it singles out circumstantial evidence and tells the jury that they have a right to convict upon such evidence, alone, notwithstanding there was the direct testimony of Rosenberg tending to connect plaintiff in error with the crime charged. While it was the duty of the jury to consider all of the evidence in the case, direct as well as circumstantial, and base their verdict upon a consideration of all of such evidence, the People had a right to have the jury informed of their right to convict upon circumstantial evidence if they believed, beyond a reasonable doubt, that circumstances had been proven to be true that could not reasonably be accounted for except on the theory that the defendants were guilty of the crime charged, and we do not think the instruction was improper in this case.

Complaint is also made of the action of the court in calling Rosenberg as a witness and allowing him to be cross-examined by the State's attorney. The State occupied a peculiar position with respect to this witness. There was evidence tending to show that he had been furnished bail by plaintiff in error, at times had been in his employ

since the commission of the alleged crime, and that plaintiff in error had furnished him money and credit to go into business. Twice before he had testified in suits in such a way as to practically leave plaintiff in error out of the bargain made between Felsenthal and witness to pay Fink for starting the fire, and on a former trial he had mistaken Harry Felsenthal for D. I. Felsenthal, thus materially weakening his testimony. Under these circumstances the State's attorney was in no position to vouch for his credibility, as he might prove a very hostile witness. He was so connected with the affair that it was essential that his testimony be had on the trial. We think, under the circumstances, that the court did not err in the exercise of its discretion in calling him as a witness. The practice of the court calling such witnesses has been approved by this court in numerous cases. *People v. Cleminson*, 250 Ill. 135; *Carle v. People*, 200 id. 494; *People v. Baskin*, 254 id. 509; *People v. Rardin*, 255 id. 9.

It is also insisted the court erred in its rulings in the admission of certain evidence. This evidence was that as to the association of plaintiff in error with Rosenberg, Lavine, Spira and others after the fire; contributing money to procure an assistant State's attorney to furnish him and others with copies of the confession of Fink; the procuring of bail for Rosenberg and paying attorneys for procuring conflicting affidavits from Jake Machilinsky, the expressman who is alleged to have delivered the gasoline to the building occupied by the D. I. Felsenthal Company, and the paying of an attorney for going to the State's attorney's office with Rosenberg and Machilinsky at a time when they were called over there by the State's attorney about this and other matters. The object of the introduction of this evidence was to show guilty knowledge on the part of plaintiff in error of the crime with which he was charged. Evidence that the accused has attempted to procure false evidence or to destroy evidence against himself

is always admissible for the purpose of showing consciousness of guilt, and so attempts by persons other than the accused to bribe or to suppress testimony are admissible if the accused had knowledge of or was in any way connected with such attempts; and where the facts are shown, it is for the jury to determine, under all the facts and circumstances proven, whether or not the accused had knowledge of or was connected with the crime with which he is charged. "It has been held that a false theory of defense is some evidence of guilt. \* \* \* The court may therefore charge that the false theory of defense indicating a consciousness of guilt may justify the jury in convicting the prisoner." (Underhill on Crim. Evidence,—2d ed.—sec. 121.) We think the evidence offered for the purpose of showing guilty knowledge was properly admitted, but the evidence as to plaintiff in error's "kiting" notes, and similar matters wholly disconnected from this case, should have been excluded.

Complaint is also made that the witness Rosenberg was allowed to testify, over objection, that he had made an affidavit about the fire. While it would be improper to allow a witness who is testifying to a fact or facts to state that he had previously made an affidavit as to such facts, it is apparent from the record that the purpose of such testimony was to explain conflicting affidavits that this witness had made. The object of the examination along this line was to clear up these matters, and not for the purpose of bolstering up his testimony by showing he had previously sworn to the same thing.

For the errors indicated the judgment will be reversed and the cause remanded to the criminal court of Cook county for a new trial.

*Reversed and remanded.*

RUTH BIGELOW, Appellant, *vs.* CHARLES BURNSIDE *et al.*  
Appellees.

*Opinion filed October 27, 1915.*

1. FENCES—the ownership, maintenance or control of a division fence is a purely statutory matter. The ownership, maintenance or control of distinct or separate parts of a division fence by adjoining property owners, and their rights and duties with reference to the same, are purely statutory matters.

2. SAME—what necessary to render person liable to contribute to repair of division fence. Under the various provisions of the act relating to fences no person is liable to contribute to the repair or re-building of a division fence until there has first been a finding by fence viewers, legally chosen, that his portion of the fence needs repair or re-building.

3. SAME—province of fence viewers not limited to apportioning division fences for repair. The apportioning of certain parts of a division fence to the adjoining owners to be kept in repair is not the only province of fence viewers, as it is clear from the various provisions of the act relating to fences that other questions may be submitted to and decided by them.

4. SAME—section 11 of act relating to fences construed. Section 11 of the act relating to fences does not authorize one adjoining owner to repair or re-build another's portion of the division fence and recover the cost thereof unless fence viewers have previously determined that such work is necessary; and this is true even though the portion of the fence which each owner is to maintain has been fixed for many years by agreement.

5. STATUTES—rule for construing a section of a statute. A section of a statute should be construed with reference to other sections of the act relating to the same subject, so that, if possible, no clause, sentence or word will be superfluous, void or insignificant.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Knox county; the Hon. R. J. GRIER, Judge, presiding.

R. D. ROBINSON, for appellant.

HARDY, WELSH & HARDY, for appellees.

MR. CHIEF JUSTICE FARMER delivered the opinion of the court :

Appellant, Ruth Bigelow, and appellees William Clark, Jennie Burnside, Fred Clark and Kate Junker, are the owners of adjoining forty-acre tracts of land in Haw Creek township, Knox county, Illinois. Appellee Salina E. Clark is the mother of the aforementioned appellees, and appellee Charles Burnside is the husband of appellee Jennie Burnside. The division fence between the two forties runs north and south, and it is stipulated that for many years by agreement appellant was to keep in repair the north one-half of said division fence and appellees and their father, from whom they claimed title, were to keep in repair the south one-half of the fence. Appellant caused a written notice bearing date September 1, 1912, to be served upon Charles Burnside, agent, Salina Clark, William Clark, Jennie Burnside and Fred Clark, informing them that if they did not make and maintain their proportion of said division fence (describing the same) within sixty days from the service of the notice, appellant would proceed to make said fence and do the same at the expense of appellees. Soon after the expiration of the sixty days' time mentioned in the notice, appellees not having complied with its request, appellant repaired and re-built the south half of said fence, this being the part it is stipulated was to be kept up by appellees. Thereafter appellant recovered a judgment before a justice of the peace against appellees for the cost of repairing and re-building the fence. Upon appeal to the circuit court that court refused to admit evidence of the condition of the fence repaired or re-built and directed a verdict for appellees, upon which the court, after overruling a motion for a new trial, rendered judgment. Appellant prosecuted an appeal to the Appellate Court for the Second District. The judgment below was affirmed by the Appellate Court and a certificate of importance granted, upon which a further appeal is prosecuted to this court.

It was the view of the trial and Appellate Courts that a land owner could not require an adjoining owner to re-build or repair his proportion of a division fence without the intervention of fence viewers, under the statute. Appellant contends that where, as in this case, the adjoining owners have agreed what part of the division fence each will repair and maintain, the intervention of fence viewers is not required by statute.

The ownership, maintenance or control of distinct or separate parts of a division fence by adjoining property owners, and their rights and duties with reference to the same, are purely statutory. Appellant contends that section 11 of chapter 54 of Hurd's Statutes of 1913, being the chapter on fences, is applicable to and controlling in this case, and that having complied with the same, the circuit court erred in directing a verdict for appellees. Appellees contend section 11 should be construed with reference to the other sections of chapter 54, and that when so construed it clearly appears, before appellant was authorized to give appellees notice to re-build their part or portion of the division fence, it must have first been found and determined by fence viewers such new fence was needed or necessary. Appellees further contend that the notice and service in this case did not comply with section 8 of the act and was therefore insufficient.

Appellant cites and relies upon *McNally v. O'Brien*, 88 Ill. 237, to sustain her position that the notice given was a sufficient compliance with the statutory requirements. In that case the defendant, without notice, removed a fence claimed by the plaintiff to be a division fence. The suit was brought to recover damages for its removal and for re-building defendant's half after having given him notice to re-build it. It appears no question was raised in the case except whether the fence was a division fence. The requirements of the statute do not appear to have been raised and were not discussed or passed upon.

The facts in *Thompson v. Bulson*, 78 Ill. 277, were so entirely different from those involved in this case that the case is of little value here, except upon the question that all the various sections of the chapter on fences should be considered and construed together.

Other cases cited are, like the cases above referred to, of little or no assistance.

So far as we have been able to learn, section 11 has not been construed with reference to the question here involved, and we shall proceed to construe it with reference to other sections of the act relating to the same subject, so that, if possible, no clause, sentence or word will be superfluous, void or insignificant, but that, if possible, every sentence and word will be given its ordinary meaning and acceptance. *Thompson v. Bulson*, *supra*; *Crozer v. People*, 206 Ill. 464; *Decker v. Hughes*, 68 id. 33; *People v. Flynn*, 265 id. 414.

Section 1 of chapter 54 of Hurd's Statutes of 1913 provides the town assessor and commissioners of highways, in counties under township organization, shall be *ex-officio* fence viewers in their respective towns, and that the county board shall appoint three persons for each precinct in counties not under township organization. Section 2 defines what shall constitute a legal fence and need not here be noticed. Section 3 provides when two or more persons have lands adjoining, each shall make and maintain a just proportion of the division fence. Section 4 provides that the owner of lands lying open, later enclosing the same, using an adjoining enclosure in so doing, shall refund to the owner of the adjoining lands a just proportion of the value of the division fence at the time of making the enclosure. Section 5 provides the value of the fence and the proportion to be made and maintained by the party so using it in enclosing his land shall be determined by fence viewers. Section 6 is as follows: "If any person neglect to repair or re-build a division fence, or portion thereof, which he ought to maintain, any two fence viewers of the town or precinct,



as the case may be, shall, on complaint by the party aggrieved, after giving due notice to each party, examine such fence, and if they deem the same to be insufficient, they shall so notify the delinquent party, and direct him to repair or re-build the same within such time as they may deem reasonable." Section 7 provides that disputes between owners of adjoining land as to the proportion of the division fence to be maintained by them is to be settled by two fence viewers of the town or precinct. Section 8 provides that when any matters referred to in the preceding sections are referred to fence viewers each party shall choose one, but if one neglect, after eight days' notice in writing, to make such choice, the other party may select both, and for all purposes of notice under the act it shall be sufficient to notify the tenant or person in possession of said adjoining premises when the owner thereof is not a resident of the town in which the fence is situated. Section 9 provides the viewers chosen by the parties shall view the premises, hear the allegations of the parties, and if they cannot agree shall select another fence viewer to act with them, and the decision of any two of them is final as to the parties to the dispute and those holding under them. Section 10 provides the decision of the viewers shall be reduced to writing and filed with the town or county clerk, as the case may be. Section 11 is as follows: "If any person who is liable to contribute to the erection or reparation of a division fence shall neglect or refuse to make or repair his proportion of such fence, the party injured, after giving sixty days' notice, in writing, that a new fence should be erected, or ten days' notice, in writing, that the reparation of such fence is necessary, may make or repair the same at the expense of the party so neglecting or refusing, to be recovered from him, with costs of suit; and the party so neglecting or refusing, after notice in writing, shall be liable to the party injured for all damages which shall thereby accrue, to be determined by any two fence viewers selected as above provided; and the fence viewers

shall reduce their appraisalment of damages to writing, and sign the same."

We deem it unnecessary to set out or refer to the remaining ten sections of the chapter on fences, other than hedge, except section 18, which we will hereafter notice.

Appellant contends that section 11, above set out in full, authorized the giving of the notice to appellees to repair or re-build their portion of the fence, since the portion of each adjoining owner had been agreed upon and fixed, assuming the responsibility of proving the necessity for repair or re-building, and that in such case the necessity of such repair or re-building need not be submitted to fence viewers. Reading the different sections of this statute with reference to each other we cannot agree with appellant, but think no person is liable to contribute to the repair or re-building of a division fence until there has first been a finding by fence viewers, legally chosen, that his proportion of the fence needs repair or re-building. It clearly is not the only province of fence viewers to apportion or designate certain parts of a division fence to the adjoining owners, for by sections 6, 8, 10 and 11 it clearly appears other questions may be submitted to and decided by them. Again, by section 18 it is provided that "fence viewers may examine witnesses on any and all questions submitted to them, and either of such fence viewers shall have power to issue subpoenas for, and administer oaths to such witnesses." We think the provisions of section 6 as to the matter of procedure apply to the facts in this case, and that the question of the need of repairs or re-building must first be determined by fence viewers before notice may be given the party in default. Section 11 itself provides: "If any person *who is liable to contribute* to the erection or reparation of a division fence shall neglect or refuse to make or repair his proportion of such fence, the party injured \* \* \* may make or repair the same." Though by agreement or stipulation that part of the division fence each adjacent owner was to keep in

repair was fixed and determined, still, when such repairs were needed or a new fence should be built was a question necessarily left open and one about which the parties might differ. This liability was to be determined by fence viewers, and after being so fixed the party in default might be notified to build or repair, as the case might be, and upon his failure so to do, the work done by the other owner, and the cost of the same, be recovered from the party in default. Appellant failed to comply with the statutory requirements. A finding by fence viewers of the need of repairs or rebuilding is a prerequisite to notice to build.

The view we take of this question renders unnecessary a determination of the sufficiency of the service of notice.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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MALGORZATA TOMCZAK *et al.* Appellees, vs. E. C. BERGMAN, Appellant.

*Opinion filed October 27, 1915.*

1. REGISTRATION OF TITLE—*when applicants for registration of title are not chargeable with notice of incumbrances.* Applicants for registration of title are not chargeable with constructive notice of incumbrances not in their chain of title, and in the absence of actual notice neither the transcript of a judgment against an apparent stranger nor the certificate of sale will be notice to them unless the names of the judgment debtor and their grantor are *idem sonans*.

2. SAME—*when additional fees may be awarded—decree should not be in favor of registrar.* Although section 108 of the Torrens law provides that the payment of \$15 by the applicant for registration of title shall be in full of all services of the registrar and examiners up to the granting of the certificate, yet in a proper case the court may decree the allowance of an additional fee for the services of an examiner and may tax the additional fee as costs against the defendant if the services were occasioned by his unfounded claim, but the decree should not be in favor of the registrar. (*Waugh v. Glos*, 246 Ill. 604, distinguished.)

3. NAMES—*variance in the spelling of names is not always material.* Not every variance in the spelling of names in deeds or judicial proceedings is material, and if names sound substantially alike when pronounced according to the usual method of speaking, they will be held to designate the same person even though spelled differently.

4. SAME—*what names are not idem sonans.* Where the name of the grantor of the applicants for registration of title is "Walenty Cierniak," they will not be bound by the record of a judgment against "W. Czerionak" unless they had actual knowledge that the names referred to the same person, as there is no practical similarity in sound and the spelling is noticeably different.

APPEAL from the Circuit Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding.

WEST & ECKHART, (WILLIAM M. KLEIN, and SAMUEL KRAUS, of counsel,) for appellant.

WINTERS, PRICE & STEVENS, for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

The principal question in this case is whether the names Walenty Cierniak and W. Czerionak are *idem sonans*. The case was an application for registration of title, and the decree ordered the registration of the title to the premises in fee simple in the applicants subject to certain incumbrances and set aside a sheriff's certificate of sale of the premises under a certain judgment. The applicants' grantor was Walenty Cierniak, who conveyed the property to them on September 3, 1913. The greater part of the purchase money remained unpaid until November 14, 1913, and in the meantime there was recorded on November 7, 1913, a sheriff's certificate of sale of the premises made on November 4, 1913, under an execution issued out of the circuit court of Cook county on a transcript of a judgment of a justice of the peace of that county against W. Czerionak, recorded on September 14, 1906, filed in the clerk's office of the circuit court on October 26, 1906. Walenty

Cierniak is the person against whom the judgment was rendered by the name of W. Czerionak. The examiner found that the transcript of judgment filed in the clerk's office was not notice to purchasers because the names were not *idem sonans* but that the certificate of sale filed in the recorder's office was constructive notice of the judgment and sale, and because the purchase money was not paid until after such recording the examiner recommended that the registration of title be subject to such sale. The court overruled the appellant's exceptions to the examiner's finding that the names were not *idem sonans* and sustained the applicants' exception to the finding that the recording of the certificate was constructive notice to them.

The applicants were not chargeable with constructive notice of any incumbrance not in their chain of title. (*Grundies v. Reid*, 107 Ill. 304.) Therefore, in the absence of actual notice neither the transcript of judgment nor certificate of sale was notice to them unless the names of the judgment debtor and of their grantor were *idem sonans*. Not every variance in the spelling of names in deeds of conveyance and judicial proceedings is material. The cases are numerous in which names spelled differently have been held to sufficiently designate the same person, because, when pronounced according to the usual method of speaking, they sound substantially alike. The wrong spelling of the name in such circumstances is not a material variance. It frequently happens that in the same document or series of documents the name of an individual may appear with widely different spellings, but the context or the order of succession or other facts may fix the identity of the person intended. In many of the cases in which the doctrine of *idem sonans* has been applied the question has not been one of notice but of identity. Here the question is one of constructive notice,—whether a purchaser from Cierniak, without any actual knowledge, is bound by the record of a judgment against Czerionak. The names look different.

According to the usual method of English pronunciation they sound different. They are foreign names. Evidence was introduced that according to the Polish pronunciation the first name would be pronounced "Sher-ni-ak" and the second "Sher-i-o-neck." Decided cases are of no particular value on this question. An ordinary man seeing these two names in an index would believe they were different names; hearing them spoken or attempting to speak them himself they would seem to be different. There is no practical identity of sound. The court properly determined that they do not come within the rule of *idem sonans*.

By the decree an additional fee of \$41 was allowed to the registrar for the services of the examiner under the order of reference, including the taking of evidence and making of his report, the court finding such additional cost to have been occasioned by the unfounded claim of the appellant. This portion of the decree concludes as follows: "It is therefore ordered that said defendants pay said costs, amounting to \$41, and a decree is hereby entered against them for said amount in favor of the registrar of titles." The appellant objects that the court could not render a decree for costs in favor of the registrar and could not compel the appellant to pay the entire cost of the reference. Section 108 of the Torrens law requires the applicant to advance a fee of \$15 in full of all services of the registrar and examiners up to the granting of the certificate of title, and in *Waugh v. Glos*, 246 Ill. 604, we held that this fee was intended to cover the registrar's fees in ordinary cases. We also held, in accordance with the same section of the statute, that an extraordinary allowance might be made in proper cases and that the court might direct who should pay it. In that case the additional fee was charged against one who had introduced no evidence and made no contest other than to insist upon the introduction by the defendant of competent evidence to establish her own title, and we held a defendant, under such circumstances, ought not to

be required to pay any part of the costs. Here the contest was over the alleged right to a judgment lien, and the costs incurred in defeating this claim, which the court adjudged to be unfounded, were rightfully charged to the appellant. No decree, however, should have been rendered in favor of the registrar.

The decree will be modified by striking out the words, "and a decree is hereby entered against them for said amount in favor of the registrar of titles." So modified the decree is affirmed.

*Decree modified and affirmed.*

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THE PEOPLE *ex rel.* Mrs. John Hanson *et al.* Defendants in Error, *vs.* A. B. ANDERSON *et al.* Plaintiffs in Error.

*Opinion filed October 27, 1915.*

1. QUO WARRANTO—*when the court does not err in refusing to carry demurrer back to information.* Where a demurrer to an information in the nature of *quo warranto* is overruled and the defendants instead of standing by the demurrer file pleas, it is not error for the court to refuse to carry back to the information a demurrer filed to the pleas.

2. SAME—*when a demurrer to pleas must be sustained.* A demurrer to pleas to an information in the nature of *quo warranto* is properly sustained where the defendants do not by their pleas attempt to disclaim or justify but set up matters of estoppel and acquiescence on the part of certain of the relators, which, however, do not apply as to other relators who are not shown to be in any way barred from asserting their rights.

WRIT OF ERROR to the Circuit Court of LaSalle county; the Hon. EDGAR ELDREDGE, Judge, presiding.

JAMES J. CONWAY, and BUTTERS & CLARK, for plaintiffs in error.

GEORGE S. WILEY, State's Attorney, (BROWNE & WILEY, of counsel,) for defendants in error.

Mr. JUSTICE COOKE delivered the opinion of the court :

Upon the petition of the State's attorney the circuit court of LaSalle county gave leave to the People, on the relation of twenty-two individuals who were land owners within what was claimed to be a drainage district, to file an information in the nature of a *quo warranto* against A. B. Anderson, Fred Bushell and Austin Sanderson, calling upon them to show by what warrant they claimed the existence of a corporation under the name of Drainage District No. 1 of the town of Earl, in that county, and claimed to exercise the corporate powers thereof as commissioners. To this information the defendants, who are plaintiffs in error here, filed two pleas. A demurrer was sustained to these pleas, and plaintiffs in error having elected to stand by their pleas, the court entered an order finding that the district was without legal existence and rendered a judgment of ouster. This writ of error has been sued out to review that proceeding.

When application was first made to the circuit court for leave to file this information a rule *nisi* was entered, and upon the return of the rule the court heard the evidence and denied leave to file the information. This judgment of the circuit court was reversed in *People v. Anderson*, 239 Ill. 266, and upon the cause being remanded the circuit court granted the prayer of the petition for leave to file the information.

Upon the hearing in the circuit court under the rule to show cause why leave should not be granted to file the information, the plaintiffs in error did not attempt to prove any facts amounting to a justification, but attempted to show that the relators were each of them barred by *laches* and acquiescence and that the public had but a theoretical interest in the proceeding. We held, upon a review of that proceeding, that the proof relating to *laches* and acquiescence of the individual relators had no application to at



least four relators, and that no reason was shown why these four should not be permitted to question the legality of the organization of the district or the election of the plaintiffs in error as commissioners. One of the four referred to in that information is now dead and another has sold his land lying within the alleged drainage district. The other two still occupy the same position they did at the time the petition was filed for leave to file the information.

By their two pleas plaintiffs in error neither disclaim nor attempt to justify, but set up matters in estoppel based upon the *laches* and acquiescence of the various relators. The facts alleged in the two pleas are identical with the facts proven at the hearing under the rule *nisi* upon the application for leave to file the information. No new facts are alleged which show any acquiescence on the part of the two relators who still own land within the alleged district, and nothing new is set forth in the pleas from which *laches* could be imputed to these two relators. Under this situation, and following the holding of the court in *People v. Anderson, supra*, the circuit court had no alternative but to sustain the demurrer to the pleas and enter a judgment of ouster.

After the demurrer was interposed the plaintiffs in error moved to carry the demurrer back to the information. The action of the court in overruling this motion is assigned as error. Plaintiffs in error demurred to the information when it was filed, and this demurrer was overruled. They did not elect to stand by the demurrer but filed their pleas. Plaintiffs in error had the benefit of the ruling of the court upon a demurrer to the information, and the court did not err in refusing to carry back to the information the demurrer to the pleas.

The judgment of the circuit court is affirmed.

*Judgment affirmed.*

MARIE C. GERLING, Appellant, vs. IRA D. LAIN *et al*,  
Appellees.

*Opinion filed October 27, 1915.*

1. **DEEDS**—*restrictions upon the use of property are not favored.* In construing a deed which conveys a fee, restrictions and limitations upon the use of the property are not favored, and, as a general rule, all doubts are resolved against them.

2. **SAME**—*what necessary to authorize a court of equity to enforce personal covenant.* While a court of equity may, in a proper case, enforce a personal covenant against a grantee or an assignee with notice, yet to authorize it to do so the instrument must be clear, unambiguous and certain, and of such a character that a court of equity can make an efficient decree and enforce it.

3. **SAME**—*what is not a covenant running with the land.* A provision in a deed that the purchaser of a lot adjoining one owned by the grantors shall within two years construct a cement driveway along the east side of the premises, which the grantors shall have the right to use for access to their adjoining premises so long as friendly relations exist between the parties, is not a covenant running with the land but is a personal covenant, and since either party may terminate the easement when friendly relations cease to exist, the covenant is not one which a court of equity will enforce against a purchaser, with notice, from the grantee.

APPEAL from the Circuit Court of McLean county; the Hon. C. D. MYERS, Judge, presiding.

LIVINGSTON & BACH, and WELTY, STERLING & WHITMORE, for appellant.

BRACKEN & YOUNG, for appellees.

Mr. CHIEF JUSTICE FARMER delivered the opinion of the court:

Appellant, Marie C. Gerling, filed her bill in the circuit court of McLean county October 23, 1913, in which she alleges that prior to and on September 6, 1910, she was the owner of lot 22, in Fairview subdivision of part of the east half of the southeast quarter of section 3, town 23,

north, range 2, east of the third principal meridian, the same being in the city of Bloomington, Illinois, and that on said date she and her husband entered into a contract for the sale of said property with appellee Ira D. Lain. Among other things this contract provided that the party of the second part (Lain) "agrees to construct cement driveway on east side of said premises for the purpose of access to their adjoining premises for vehicles, so long as friendly relations exist between the parties hereto and said right is not abused, said driveway to be constructed within two years from this date." The contract further provided that "the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties." The bill avers that appellant and her husband on September 19, 1910, executed and delivered a warranty deed to appellee Ira D. Lain conveying said lot 22. This deed contained a provision that "grantee by his acceptance of this deed agrees that within two years from date hereof he will construct a cement driveway along the east side of said premises, which first parties grantors should have the right to use for access to their adjoining premises with vehicles so long as friendly relations exist between said parties. Said right is not to be abused." The bill alleges that appellee Ira D. Lain and his wife, March 30, 1912, by warranty deed conveyed said lot 22 to appellee Walter S. Johnson. The bill avers that from the execution and delivery of the deed from appellant and her husband to Lain until October 1, 1913, she used the east ten feet of said lot 22 for the purpose of access to their adjoining premises; that prior to the execution of the contract with Lain, and continuously to the present time, appellant owned the premises adjoining said lot on the east, and that a residence on the west side of said lot is adjacent to the east line of said lot 22. The bill alleges that neither Lain nor Johnson has constructed said cement driveway as provided in the contract

and deed before mentioned but both refuse to construct the same, and that Johnson now refuses to permit appellant and her tenants to use the said strip of land and has constructed an iron fence along the east line of said lot 22. The bill alleges appellant has never released appellees from the provisions of the contract or deed; that an easement exists in a ten-foot strip of land along the east side of said lot 22 as being valuable and essential to the enjoyment of appellant's abutting premises. The bill avers that while no mention of such driveway is made in the deed from Lain to Johnson, said Johnson had notice of the covenants contained in the contract of September 6, 1910, and of the deed of September 19, 1910, before mentioned. The bill alleges that up to the present time friendly relations have existed between Lain and appellant, and avers the construction and use of said driveway will not impair nor injure the remainder of said lot 22 now owned by Johnson. The bill prays that the covenant contained in the contract of sale of September 6, 1910, and in the deed of September 19, 1910, be specifically enforced; that appellees be compelled to construct a driveway on the east side of lot 22 ten feet wide, or on so much of it as may be necessary, for access to the adjoining property by vehicles, and that appellant, her heirs and assigns, be decreed to forever have an easement in said premises for driveway purposes for access to her adjoining lot.

Appellees filed a demurrer to said bill, in which they set up as grounds for demurrer that the alleged covenant contained in the contract of September 6, 1910, and the deed of September 19, 1910, was not a covenant running with the land, and being but a personal covenant between appellant and appellee Lain, the appellant has no rights as against appellee Johnson; also that said bill does not allege any facts which in law would constitute a recognition by Johnson of any easement claimed by appellant; and further, that the bill does not aver that friendly relations

have heretofore existed and do now exist between appellant and Johnson. The court, upon hearing, sustained the demurrer, and appellant electing to stand by her bill, the bill was dismissed for want of equity, and this appeal is prosecuted from that decree.

"A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the vendee or other assignee of the land. A personal covenant, or one not running with the land, does not so operate but binds only the covenantor personally, or, in certain cases, those who take lands which are subject to restrictive covenants, with notice thereof." (7 R. C. L. 1099.) Whether the appellant can enforce the provisions of this contract and deed against Johnson depends upon whether it was the intention of appellant and Lain to enter into said agreement for the benefit of appellant's lot which she retained, and this intention is to be ascertained from the language of the contract and deed construed in the light of surrounding circumstances. (*Hutchinson v. Ulrich*, 145 Ill. 336; *Hays v. St. Paul M. E. Church*, 196 id. 633.) In construing such provisions when a fee is conveyed, restrictions and limitations upon the use of the property are not favored, and all doubts, as a general rule, are to be resolved against them. *Eckhart v. Irons*, 128 Ill. 568; *Ewertsen v. Gerstenberg*, 186 id. 344; *Hays v. St. Paul M. E. Church*, *supra*.

We construe the provision in both the contract and deed as at most but a personal covenant between the parties, not for a perpetual easement in land but in the nature of a license, terminable by the action of either party at any time when friendly relations ceased to exist between them; and while a court of equity may in a proper case enforce a personal covenant against a grantee or assignee with notice, (*Willoughby v. Lawrence*, 116 Ill. 11,) to authorize it to do so the instrument must be clear, unambiguous and certain and of such character that a court of equity

can make an efficient decree and enforce it when made. (*Sellers v. Greer*, 172 Ill. 549; *Carson v. Davis*, 171 id. 497; *Long v. Long*, 118 id. 638; *Woods v. Evans*, 113 id. 186.) The contract for the conveyance by appellant to Lain was made between appellant and her husband on one side and Lain on the other. It recites that it is mutually agreed between the parties that the covenants and agreements therein should extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties. This latter provision is not contained in the deed, which recites that the grantee agrees within two years to construct a driveway along the east side of the premises, which the grantors should have the right to use for access to their adjoining premises with vehicles so long as friendly relations should exist between the parties, said right not to be abused. It is evident it was not in the contemplation of the parties that the right of passage should be perpetual and run with the land, but that it should continue while friendly relations existed between the owners of the two lots. It would be a perversion of the meaning of the parties to say that it was intended to continue as long as friendly relations existed between the appellant and husband and Lain after the latter had sold and conveyed his lot to another. The friendly relations referred to must have meant friendly relations between the owners of the adjoining lots. If Johnson took the lot subject to the right of a passageway over it by appellant he took it subject to all the conditions imposed, which would include the right to terminate it when friendly relations ceased to exist between the respective parties or in case the right was abused. In this view we think the bill was obnoxious to demurrer in not alleging the existence of friendly relations between the Gerlings and Johnson. But the more serious objection to the bill is that it does not present a case where a court of equity can render an efficient decree and enforce it. The right of appellant to the passageway is not, and was not

intended to be, absolute. It was to continue only during the existence of friendly relations between the respective owners of the lots. When such relations ceased to exist either party might terminate it. In such case a court of equity will not decree specific performance.

The decree is affirmed.

*Decree affirmed.*

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ARTHUR YOCKEY, Exr., Appellee, vs. ANGIE MARION,  
Appellant.

*Opinion filed October 27, 1915.*

1. ANTE-NUPTIAL CONTRACTS—*an engagement to marry is necessary to create confidential relation.* If an engagement to marry exists a confidential relation is created which imposes upon the intended husband the duty to disclose to his intended wife the amount and value of his property, but it is incumbent upon a wife who seeks to repudiate an ante-nuptial contract to show that a marriage engagement existed when the contract was made.

2. SAME—*when ante-nuptial contract does not show an engagement to marry.* A statement in an ante-nuptial contract that the contract is made in contemplation of the marriage of the parties does not show that an engagement to marry existed when the contract was made.

3. SAME—*when an ante-nuptial contract remains in force.* The fact that the husband may have said, after his marriage, that the ante-nuptial contract under seal, made before the marriage, did not amount to anything and that he had done away with it, does not establish a cancellation of the contract, where it was, in fact, not canceled but was afterward recorded by the husband and reaffirmed in his will.

4. SAME—*wife's assent to cancellation of ante-nuptial contract is necessary.* In order that the proposed cancellation by the husband of an ante-nuptial contract under seal may be effective the wife's assent to such cancellation is necessary.

5. SAME—*when an ante-nuptial contract does not bar widow's award.* A provision in an ante-nuptial contract that the intended wife accepts the provisions made for her "in lieu of and in satisfaction and bar of dower or thirds to which by the common law or by custom or otherwise she might be entitled to, in or out of

the property" of the intended husband, is not broad enough to bar the widow's award.

6. ADOPTION—*what does not affect jurisdiction of court.* If the averments of an adoption petition are sufficient to give the county court jurisdiction the order of adoption is not open to collateral attack, and the fact that the petition does not allege that the parents are dead but merely that they are supposed to be dead does not affect the jurisdiction of the court, as no one but the parents, if living, have the right to complain.

APPEAL from the Circuit Court of Christian county; the Hon. THOMAS M. JETT, Judge, presiding.

J. E. HOGAN, and E. E. DOWELL, for appellant.

ARTHUR YOCKEY, *pro se*, (E. C. IRVINE, W. B. McBRIDE, and LESLIE J. TAYLOR, of counsel,) for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, Arthur Yockey, executor and trustee under the will of John Newton Marion, deceased, filed his bill in the circuit court of Christian county against the appellant, Angie Marion, widow of the testator, and other defendants, who were heirs-at-law, legatees and devisees under the will, asking the court to construe the will and an ante-nuptial contract, and to decree that the contract barred dower, homestead, widow's award, and every other legal right of the appellant in the estate. Afterward the appellant filed her bill against the appellee and the heirs-at-law, legatees and devisees for a partition of the real estate owned by the testator and for the assignment of dower and homestead, alleging that the ante-nuptial contract was void when made and was afterward canceled; that she had filed her renunciation of the will and elected to take under the statute, and that a proceeding by which Joseph Gordon was declared the adopted son of the testator was void. During the pendency of the appellee's suit the appellant filed her petition in the county court for a



widow's award, and it was allowed to her and fixed at \$2000. The appellee appealed to the circuit court, where the chancery cases were consolidated and the court heard them together with the appeal from the county court. By the decree the court construed the will and the ante-nuptial contract, and held that the appellant was barred by the contract of all right and interest in the estate except her right to the widow's award and that the adoption proceeding was valid. It was ordered that the appellant be allowed her award of \$2000, and the court adjudged against her the costs in the suit in which she filed the bill and the costs in the other suits against the appellee. The appellant prayed and was allowed an appeal, and has assigned errors on the decision of the court concerning the ante-nuptial contract and the adoption proceeding, and the appellee has assigned cross-errors concerning the allowance of the widow's award.

In the spring of 1886 Joseph Gordon was brought, with other children, from the Juvenile Asylum of New York to Christian county and was placed in the home of John Newton Marion and Elizabeth A. Marion, his wife, who were childless. He lived with them as a member of the family, and at the December term, 1891, of the county court of Christian county an order was entered upon their petition declaring him their adopted son and changing his name to Joseph Gordon Marion. The adopted son lived with John Newton Marion and his wife, and was regarded by them, and each of them, so long as they lived, as their adopted son. Elizabeth A. Marion died on July 17, 1894, and by her will devised to the adopted son 100 acres of land. About 1895 or 1896 John Newton Marion employed the appellant, who was then Angie Anderson, as his housekeeper, and she remained in that employment six or seven years until her marriage to him, on April 23, 1902, the family until that time being composed of her and her future husband and the adopted son. On April 18, 1902,

the appellant and John Newton Marion made and acknowledged the following ante-nuptial contract:

"This indenture, made and entered into by and between J. Newton Marion, of the city of Taylorville, in the county of Christian and State of Illinois, party of the first part, and Angie Anderson, of the city of Taylorville, in the county of Christian and State of Illinois, party of the second part:

*"Witnesseth:* That in contemplation of marriage to be consummated in the future between the parties to this instrument, and for the further purpose of barring dower or claim or right of dower which might accrue by reason of such intended coverture to the said party of the second part, of, in and to or out of all the lands or estates, either in law or equity, whereof the said party of the first part now is or shall be seized at any time during coverture between the parties to this instrument. And the party of the first part agrees, in consideration of the said marriage, to grant unto the party of the second part, at the time of his death and so long thereafter as she remains his widow, the use, occupation, management and control of the following described property, to-wit: Lots five (5) and six (6), in block two (2), in Wilkinson's Second addition to Taylorville. The said first party further agrees that at his death and so long as second party shall remain his widow, that in addition to the use, occupation, management and control of said premises before mentioned that the sum of \$150 be paid to the party of the second part, annually, by the legal representative of the party of the first part.

"It is hereby agreed and declared that the provisions hereinbefore mentioned are made for the said intended wife, and she does hereby accept the same, in lieu of and in satisfaction and bar of dower or thirds to which by the common law or by custom or otherwise she might be entitled to, in or out of the property, either real or personal, of which said first party might die seized.

JOHN N. MARION, (Seal)  
ANGIE ANDERSON. (Seal)"

Marion was then seventy-three years old and the appellant was fifty-five years old. He had no child or descendants but had the adopted son, and she was a widow having children and grandchildren of her former marriage. The contract was left with R. C. Neff, an attorney at Taylorville, and a marriage between the parties took place on April 23, 1902. The contract remained in the possession of Neff until the fall of 1906, when he delivered it to Marion, who had it recorded on January 21,

1907. On January 30, 1907, the will in question was executed, in which the testator recited the existence of the marriage settlement of record entered into before the marriage, and declared that in conformity with that agreement he devised to his wife for her natural life or so long as she remained his widow, the use, occupation, management and control of the homestead property in Taylorville, described in the contract, and in like conformity to the settlement gave her \$150 per annum during her life or so long as she should remain his widow. He further directed his executor and trustee to pay all taxes, assessments and insurance on the homestead property, to keep the place in good repair and make necessary improvements during the natural life of the appellant or so long as she remained his widow, and if the sum of \$150 per annum should not be sufficient to keep her, on account of sickness or if she should become an invalid in her declining years, the executor and trustee should allow her such additional sums from time to time as might be necessary for her comfort and support and upon her death to give her proper burial and pay her funeral expenses. The testator died on October 11, 1913, leaving the appellant his widow, and the will was admitted to probate. On October 27, 1913, the appellant filed in the county court her renunciation of the will and her election to take her legal share of the estate. The estate amounted to from \$30,000 to \$35,000, and at the time the contract was made Marion was worth perhaps \$20,000.

The grounds upon which the appellant alleged by her bill that the ante-nuptial contract was void were, that it was not read or explained to her, that she was not advised as to its legal effect or her rights and was ignorant of the nature, character and value of the property and estate of her intended husband, and that the provision made for her by the contract was disproportionate to the value of the estate.

To prove the first alleged fact, R. C. Neff, the solicitor who filed the appellant's bill but had withdrawn as solicitor and sat at the counsel table during the hearing, suggesting facts for her benefit and aiding her solicitor, was called as a witness. He testified that when the parties came to his office after the contract had been drawn they sat down together and Marion read it and asked Mrs. Anderson to sign it. He also said that Marion then stated what he wanted and they talked about the contract. John B. Colegrove, who was at that time a partner of Neff, testified that the parties were at the office about fifteen minutes, talking about the contract, and during that time Marion stated what he wanted and they discussed the contract. Colegrove took the acknowledgment, and the averment of the appellant that she was ignorant of the contents of the contract is not supported by the evidence.

There is an argument against the conclusion of the court on the ground that there was a confidential relation between the parties and it was the duty of Marion to disclose the amount and value of his property to his intended wife, who confided in him. It is true that where an engagement to marry exists, that fact creates a confidential relation which imposes a duty on the husband to make a fair disclosure of his property, but if there was such an engagement prior to the making of the contract it was obligatory on the appellant to allege and prove the fact, and she did neither. The contract recited that it was made in contemplation of marriage, which, as a matter of course, was true. It would be an odd sort of thing for parties to make an ante-nuptial contract if nuptials were not in prospect, but the statement of the contract does not signify that an engagement had been made or that the execution of the contract was not a condition precedent to any engagement at all.

The next charge, that the appellant was ignorant of the nature, character and value of the property and estate

of her intended husband, was not only not proved but was disproved. During the time that the appellant was house-keeper for Marion he was the owner of 80 acres of land and had a life estate in 120 acres under the will of his deceased wife, and the property was rented. The tenants visited at the Marion home, took dinner with the family, paid rents in the presence of the appellant and discussed farm questions in general. Marion and the appellant drove to a farm occasionally and took dinner there, and we can not accept the theory of the bill that she was ignorant of the extent of his estate.

The fact, if it is a fact, that the provision for the appellant was disproportionate to the estate of the testator does not affect the validity of the contract.

It was also alleged that the contract was canceled, and on that subject Neff testified that when he delivered the contract to Marion the latter said that he and his wife had agreed to have the contract canceled, and that he afterward said that he had embodied principally the contract in his will. A daughter of appellant testified that Marion said that he and his wife at one time had a contract, but it did not amount to anything any more and was destroyed and done away with. A doctor said that when advising Marion to make a will he said that he had a contract at one time with his wife but it did not amount to anything any more. Whatever Marion may have said about the contract, there never was, in fact, any cancellation by him, as it was afterward recorded and he re-affirmed it in his will, and there was no evidence that the appellant assented to any cancellation, which would have been necessary to effect that result. As a matter of law, the contract, being under seal and not being canceled, destroyed or surrendered, remained in force. A sealed executory contract cannot be altered, modified or changed by parol agreement, although it may be surrendered and canceled by an executed parol agreement. (*Alschuler v. Schiff*, 164 Ill. 298;

*Brettmann v. Fischer*, 216 id. 142.) An executed parol agreement may be shown to defeat a recovery upon an instrument under seal, and although the parol agreement may have been without consideration it may become a basis for an equitable estoppel, if by means of it one of the parties has been led into a line of conduct prejudicial to his interests if the contract should be enforced. The rule in equity also is that a party asking the court to enforce the specific performance of a contract will fail in his suit if a rescission or abandonment of the contract sought to be enforced is shown, and such rescission or abandonment may be deduced from circumstances or a course of conduct. (*Lasher v. Loeffler*, 190 Ill. 150.) The marriage had been consummated and nothing more was to be done by either party, so that their rights had become fixed, but whether the contract was executory or executed, it was not canceled or surrendered but remained in force.

The bill of the appellant charged that the petition for adoption of Joseph Gordon Marion did not show upon its face the necessary facts to give the county court jurisdiction to act. She would only be concerned with any question as to the validity of the proceeding in case the antenuptial contract should be set aside and the extent of her interest in the estate should be affected by the question whether he was an heir. Inasmuch as she failed to establish any claim to a share of the estate, whether he was legally adopted or not does not concern her. But the objections raised to the proceeding were without substantial basis. The law conferred power on the county court to make the order upon the filing of a petition stating certain facts. It will not be necessary to enter into a detailed statement of the contents of the petition, but its averments were sufficient to give the court jurisdiction and the order of adoption is therefore not open to collateral attack. (*Flannigan v. Howard*, 200 Ill. 396.) The petition alleged that the parents of the child were supposed to be

dead, but if, as a matter of fact, they were living, (of which there was no competent evidence,) the jurisdiction of the court would not be affected, and no one else could complain except the father and mother. *Sullivan v. People*, 224 Ill. 468.

The appellant objects to the consideration of the cross-errors concerning her award, on the ground that they attack the decision of the court in the appeal from the county court, in which it is said a separate judgment was rendered. If it is true that there was a separate judgment, it is also true that the circuit court had acquired jurisdiction by the filing of the appellee's bill praying that the court should declare the appellant barred of the widow's award by the contract, to determine that question. The court did determine it by the decree and allowed the award which was to be paid to her. We are of the opinion, however, that the cross-errors cannot be sustained. In a case where the widow is the only person interested, an ante-nuptial contract which is broad enough in its terms to include the widow's award will operate as a relinquishment of the right to an award. (*Kroell v. Kroell*, 219 Ill. 105; *Pavlicek v. Roessler*, 222 id. 83.) This contract is not as broad in its terms as the contracts in which it has been held that the award was released. It, in terms, releases the appellant's claims to dower and thirds in the property, real and personal, of the testator, which referred to the widow's share of the real and personal property of a deceased husband. She agreed to accept what was provided for in the contract for the interests therein specified, but the language was not broad enough to bar her of every claim she might have against the estate. The widow's award is a statutory allowance for the benefit of the widow, and where it is neither released in terms nor by language sufficiently broad to include it, it should not be regarded as relinquished.

The decree is affirmed.

*Decree affirmed.*

THE PEOPLE *ex rel.* F. W. Matthiessen *et al.* Appellants,  
*vs.* C. B. LIHME, Appellee.

*Opinion filed October 27, 1915.*

1. CORPORATIONS—*when corporation must look to its stock register to ascertain who are its stockholders.* A corporation must look to its stock register to ascertain who are its stockholders, where the act under which the company is incorporated provides that the capital stock shall be transferred on the books of the company in such manner as its by-laws may prescribe.

2. SAME—*when assignee of stock becomes stockholder.* Where the transfer of stock is required to be made on the books of the company, one may be made a stockholder by having the stock assigned to him, the transfer made on the books and a certificate issued to him for it.

3. SAME—*assignor is legal owner of stock until transfer is made on the books.* An equitable title may be conferred upon the assignee of stock by a delivery of the certificate, with the blank assignment and power of attorney thereon, signed by the assignor, but the assignor will remain the legal owner of the stock until the transfer is made on the books of the company.

4. SAME—*eligibility to be director follows legal ownership of stock.* Trustees holding the legal title to shares in a corporation are stockholders, and the eligibility to be a director follows the legal ownership, irrespective of the trusts under which the shares may be held.

5. SAME—*one to whom stock is transferred for express purpose of qualifying as director is eligible.* A stockholder to whom stock has been transferred on the books of the company is a stockholder and eligible to be a director, even though the transfer to him was for the express purpose of making him eligible to be a director, and although he signs a blank assignment of the certificate and also a paper stating that he does not claim private ownership of the stock but that it is part of a trust estate.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. JOE A. DAVIS, Judge, presiding.

GEORGE WILEY, State's Attorney, WILLIAM J. CALHOUN, and M. F. GALLAGHER, for appellants.



MONTGOMERY, HART, SMITH & STEERE, (CHARLES S. CUTTING, LOUIS E. HART, and NORMAN H. PRITCHARD, of counsel,) for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

This was an information in the nature of a *quo warranto*, in the circuit court of LaSalle county, requiring C. B. Lihme to answer by what warrant he claimed to hold and execute the office of director in the Matthiessen & Hegeler Zinc Company, a corporation. A plea was filed and a trial had by the court without a jury, resulting in a judgment in favor of the defendant, which the Appellate Court for the Second District affirmed. A certificate of importance was granted and an appeal allowed to this court.

The appellants deny the eligibility of the appellee to be a director. The Matthiessen & Hegeler Zinc Company was organized in January, 1871, under "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," in force February 18, 1857, with a capital stock of \$426,000, divided into 426 shares, for a term of fifty years, for the purpose of mining, smelting, rolling and manufacturing zinc. Section 4 of the act provides that "the affairs of such company shall be managed by a board of not less than three nor more than seven directors, who shall be stockholders therein, and who shall, after the first year, be annually elected by the stockholders, to serve for one year and until their successors shall have been elected." Since its organization the stock has been equally divided between E. C. Hegeler and members of his family on the one part and F. W. Matthiessen and members of his family on the other part. E. C. Hegeler died in June, 1910, and by his will left all of his stock in the zinc company, consisting of 212 shares, to Mary Hegeler Carus, his daughter, as trustee for the benefit of his seven children. The provisions of the will creating the trust, so far as necessary to be set out, are as follows:

"Said trustee shall cause to be transferred to her all of said shares and have new certificates of stock issued to her as trustee, and the said shares shall stand in her name, as trustee, upon the books of said company: *Provided, however*, that said trustee shall have the power and authority to transfer one or two shares, as may be necessary, to herself as an individual, or to one or two other persons, to enable such other person or persons to act as directors or director in said company. Said trustee shall continue to so hold and control said shares so bequeathed to her in trust until the expiration of the present charter of said company, and shall then convert said shares into cash and distribute such cash, in equal parts, among my children, and if any of my children be then dead leaving children of the body begotten then surviving, then such children of any such deceased child of mine shall take their parents' share. Until the expiration of the charter of said company said trustee shall collect and receive all the dividends upon all said shares so standing in her name as trustee, and out of said dividends shall pay (1) to herself, as compensation as such trustee, ten per cent of the amount of such dividends; (2) such additional sum as she may find necessary, to some suitable person selected by her to act as a director, as aforesaid; (3) such additional sum as she may find necessary to procure and pay for legal advice; and the remainder of such dividends shall be distributed, as soon as received by her, among my children in equal parts, and if any of my children die leaving children of the body begotten, then such children of any such deceased child of mine shall receive their parents' share of such dividends. I hereby declare that my intention and aim in placing all of the said shares of stock in the hands of a trustee, as above, is that all of said shares shall be voted and controlled as a unit, for the protection of the interest in said company represented by said shares."

Mrs. Carus owned one share of stock individually at the time of her father's death. In the settlement of some controversy between the heirs it was agreed on October 12, 1910, that Mrs. Carus should transfer this share to herself as trustee. Instead of doing so she assigned it to C. B. Lihme, to whom a new certificate was issued on December 17, 1910. The certificate stated on its face that it is transferable only on the books of the company upon the surrender of the certificate in person or by proxy. On December 21, 1910, Lihme signed the following instrument:

"I, C. B. Lihme, do hereby acknowledge and certify that the share of stock transferred to me in person for the purpose of qualifying me as a director in the Matthiessen & Hegeler Zinc Company is not held by me under any claim of ownership and is not to be construed as any part of my private estate, but I acknowledge that I hold the same merely for the purpose of qualifying me as a director in said zinc company, and that said share of stock is a part of and belongs to the 213 shares of stock held in trust under the agreement dated October 12, 1910, and signed by the seven children of the late Edward C. Hegeler, said agreement providing, among other things, for the holding and disposition of said zinc company stock.

Dec. 21, 1910.

C. B. LIHME.

Witnessed: C. Diesterweg."

At the same time Lihme signed a blank form of assignment indorsed on the back of the certificate of stock, as follows:

"For value received I hereby sell and assign to.....  
all my interest in the within certificate, and appoint.....  
my proxy on the books of said company....."

"Witness my hand and seal this 20th day of December, A. D.  
1910.

C. B. LIHME. (Seal)

Attest: C. Diesterweg."

The certificate so indorsed by Lihme in blank and the above instrument signed by him were then deposited in the Illinois Trust and Savings Bank of Chicago, in a safety deposit box rented by all the heirs of E. C. Hegeler and standing in the joint names of Mary Hegeler Carus and Julius W. Hegeler, to which access could be had only by

the joint action of Mrs. Carus and Hegeler. In this box were kept the stock certificates representing the stock held by Mrs. Carus as trustee and other documents belonging to all of the heirs of E. C. Hegeler, and nothing else, it having been rented for that purpose. The stock stands in the name of C. B. Lihme, and the dividends have always been accounted for by him to the heirs in the same manner as the dividends on the stock held by Mrs. Carus as trustee. There have been several dividends, and Lihme always indorsed the identical check which he received, to Herman Hegeler, the treasurer of all the heirs, and mailed it to him as soon as received.

E. C. Hegeler was president of the company from its organization until December, 1903. Mary Hegeler Carus was president from December, 1903, to December 18, 1913. A member of the Matthiessen family has been secretary ever since the organization of the corporation. From December 18, 1903, until December 18, 1913, George P. Blow was secretary. Throughout the existence of the corporation, until December 18, 1913, the board of directors was elected equally from the two interests.

On February 27, 1913, a contract was entered into between Mary Hegeler Carus, trustee under her father's will, party of the first part, and C. B. Lihme, party of the second part, whereby, after reciting that under the terms and provisions of the will aforesaid the party of the first part holds in trust, until the expiration of the present charter of the Matthiessen & Hegeler Zinc Company, all of the shares of the capital stock of said company owned by said Edward C. Hegeler at the time of his death and is authorized to select a suitable person to act as director in that company and to pay to such person such sum as she shall find necessary as compensation for his services as director, and the said party of the first part deems the said party of the second part to be a suitable person to act as said director and has selected said party of the second part to

act as director in the said company during the continuance of this trust, the party of the first part, as trustee as aforesaid, agrees to, and does, employ the party of the second part to act as director of the said company for the term of seven years from December 18, 1912, and to pay him, as full compensation for services to be rendered as such director, fifteen per cent of the net profits accruing each year to the stock in said company of which the party of the first part is trustee, and the party of the second part accepts the office of director for seven years, and agrees to give to the performance of his duties such time, attention and energy as shall be necessary for the best interests, advantage and success of the said company, and to faithfully, diligently and according to his best abilities, in all respects, use his utmost endeavors to promote the interests and profitable management of said company. At the annual meeting of the stockholders on December 19, 1910, immediately after receiving the certificate of stock issued to him, the appellee was elected a director, by the unanimous vote of all the stockholders, for the term of one year, and by the like vote was again elected at the meeting on December 18, 1911, and again on December 18, 1912. On December 17, 1913, the day before the annual stockholders' meeting in that year, the petition was filed in this case to oust him from office, on the ground that he was not a stockholder of the company and not eligible to be a director.

That the appellee was legally elected a director if he had the legal qualifications for the office is conceded. The appellants' only contention is that he was not a stockholder within the meaning of the statute requiring directors to be stockholders. Section 8 of the act under which the zinc company is incorporated provides that the capital stock shall be transferable on the books of the company in such manner as its by-laws may prescribe, and it is to the stock register, therefore, that the corporation must look to ascertain who are its stockholders. When Mrs. Carus assigned

to the appellee the one share of stock which she owned and it was transferred to him on the books of the company and a certificate was issued to him for it he became a stockholder of the company. He was vested with the entire legal and equitable title, subject to the terms of any agreement by which he was bound. He still has such title except to the extent that he has voluntarily parted with it. The title could pass from him only by the surrender of his certificate and a transfer on the books of the company. He could confer an equitable title upon an assignee by a delivery of the certificate, with the blank assignment and power of attorney thereon, signed by the appellee, but the legal title would still remain in the appellee until a transfer was made on the books of the company. (*Otis v. Gardner*, 105 Ill. 436.) He still holds the legal title to this share of stock.

The appellants contend that appellee is only a sham or pretended stockholder, having no pecuniary interest whatever, arising from the ownership of stock, in the success of the corporation, and is therefore not qualified as a director. Counsel insist that a director must not only be a stockholder of record, but that he must also have a personal, pecuniary interest in the corporation, so that its affairs shall be managed by those having a financial interest in it. At the same time they concede, though insisting it has nothing to do with the case, that a trustee holding stock but having no interest therein other than as trustee may be a director. This is in accordance with the statute under which the Matthiessen & Hegeler Zinc Company is incorporated, for section 14 of that statute declares that every executor, administrator, guardian or curator shall represent the shares of stock in his hands at all meetings of the company and may vote accordingly as a stockholder. It is also in accord with the general doctrine that an executor may be a director, that trustees holding the legal title to shares are stockholders, and that eligibility to be a director

follows the legal ownership, irrespective of the trusts under which the shares may be held. Cook on Corporations, sec. 623; Thompson on Corporations, sec. 919; *Casper v. Kalt-Zimmers Manf. Co.* 159 Wis. 517; *Schmidt v. Mitchell*, 101 Ky. 570; *Grundy v. Briggs*, 1 Ch. Div. (1910) 444.

The foregoing authorities further hold that a stockholder to whom stock has been transferred for the express purpose of qualifying him to be a director is qualified. In Clark & Marshall on Corporations (sec. 661) it is said: "It has been held that beneficial ownership is not necessary, and that a person who holds the legal title to stock on the books of the company is qualified." Where it was required that a director should be the holder, in his own right, of one hundred shares, it was held that one having the requisite number of shares in his name, though he had been adjudicated a bankrupt and a trustee elected, was qualified, the shares not having been transferred upon the books of the company, the court saying that it was no longer open to question that one may hold as a registered owner in his own right though he has no beneficial ownership, and that holding as trustee without beneficial ownership will do. (*Sutton v. English and Colonial Produce Co.* 2 Ch. Div. (1902) 502; *Pulbrook v. Richmond Consolidated Mining Co.* 9 Ch. Div. 610.) In *State v. Ferris*, 42 Conn. 560, a bankrupt was held entitled to vote stock standing in his name on the books of the company though the title had passed to his assignee under the provisions of the Bankruptcy act. The person in whose name stock is entered on the books of the company, whether as a trustee or individually, is, as between himself and the company, the owner to all intents and purposes and particularly for the purposes of an election. (*People v. Robinson*, 64 Cal. 373.) In *In re Argus Printing Co.* 1 N. Dak. 434, it was held that one who had pledged his stock, which had been transferred on the corporate records by the pledgee, had no right to vote the stock, but that the pledgee in whose name the stock

stood had such right, and that a person to whom stock has been transferred for the sole purpose of qualifying him as a director is so qualified. One who holds stock for the express purpose of qualifying him as an official is qualified. *In re Leslie*, 58 N. J. Eq. 609; *State v. Leete*, 16 Nev. 242.

In answer to the argument that officers of a corporation should be personally interested in its welfare, and that that can be the case only when the legal and beneficial interests unite in the same person, the Supreme Court of Wisconsin said in *Casper v. Kalt-Zimmers Manf. Co. supra*: "We do not so consider it. Trust duties are some of the most sacred duties there are, and the confidence reposed through them is seldom abused. Even where stock is transferred for the express purpose of qualifying one to hold a corporate office, the person so transferring it is personally interested in the sound management of the corporation and would be unlikely to jeopardize his interest by placing the stock in incompetent hands. The rule that merely a legal title qualifies is more in consonance with present business requirements and is fraught with no undue hazard to stockholders."

A director of a corporation is only an agent and need not be a stockholder but for the statute. It may be desirable to have for a director a person who is not a stockholder. "A stockholder may have purchased stock with the view of becoming a director, or have obtained it by gift, or may hold it upon a trust, and be qualified to be a director. If the stock was legally issued and is not the property of the corporation and the legal title is in him he is *prima facie* capable of being a director, and his right to be a director by virtue of his legal title to such stock can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company or to



carry into effect some fraudulent arrangement with the company." *In re St. Lawrence Steamboat Co.* 44 N. J. L. 529.

The appellants contend that the transfer of the stock to Lihme by Mrs. Carus was a mere formal act; that all interest, title, possession and control were withheld from him, and that immediately after receiving the certificate he handed it to Mrs. Carus and it was deposited in the private box of Mrs. Carus and Julius Hegeler, to which the appellee had no access, and they therefore insist that the return of the certificate to Mrs. Carus re-invested her with the legal title if she had ever parted with it. The legal title, as has been said, could not be re-conveyed to Mrs. Carus without a transfer on the books of the company, but the certificate, when returned to Mrs. Carus, was accompanied by a written statement of Lihme which showed his exact relation to this share of stock. Counsel rely upon their construction of this statement to some extent as justifying their position, but they misconstrue it. It states, in substance, that he holds one share of stock, which has been transferred to him individually for the purpose of qualifying him as a director,—not as his individual property, but as a part of the trust property of the Edward C. Hegeler estate and subject to the provisions of that trust. Counsel insist that he declares emphatically that he has no personal interest in the share. He does, but that is immaterial. They say he holds no share and has no right to take possession of the certificate. This is an erroneous deduction. On the record he appears as owner, and while he has not the manual possession of the certificate it is deposited with the other trust certificates, and there is no reason to suppose that he could not take possession of it if any occasion should arise, in connection with the trust, for his doing so. No one interested has ever refused, so far as appears, to recognize his right as trustee and his ownership of and authority over the certificate as such trustee. On the contrary, he has been recognized as the owner and the divi-

dends on the stock have been paid to him. Counsel say the appellee declares that the stock was registered in his name merely to qualify him as a director, (which is immaterial,) and that it was a part of and belonged to a trust held by another. He declares that it is a part of and belongs to a trust but not that the trust is held by another. What he does say is that the trust it belongs to is under the agreement of the seven children of Edward C. Hegeler, which provides, among other things, for the holding and disposition of the said zinc company stock. That agreement does not appear in the record, but it could not have been inconsistent with the will of Edward C. Hegeler, which provides that the stock must be held by Mrs. Carus except one or two shares, which she may transfer to one or two other persons. The appellee's share is one of those shares which Mrs. Carus was authorized to transfer, and he is the person to whom she transferred it under the power given by the will. By his acceptance he consented to hold it upon the same trusts as Mrs. Carus holds the shares held by her, and he is subject to the same obligation, so far as this share of stock is concerned, as she is in regard to the larger number of shares which she holds. Naturally, as stated by counsel, the appellee never claimed any benefit arising from the share, but immediately indorsed the checks for dividends to those who were entitled to receive them under the trust.

In order to secure an equal representation in the corporation with the Matthiessen interest, Edward C. Hegeler's will authorized his trustee to join one or two other persons, as she might find necessary, with her in the trust and to provide for their compensation. In pursuance of this authority she joined the appellee with her and by the contract in the record provided for his compensation. He holds one share of stock in the corporation as a trustee and is therefore eligible to be a director.

The judgment is affirmed.

*Judgment affirmed.*

RAMA O. GOMEL, Appellant, vs. ERNEST G. MCDANIELS,  
Appellee.

*Opinion filed October 27, 1915.*

1. **DEEDS**—*general rule as to delivery of a deed to third person for grantee.* Delivery of a deed by the grantor to a third person for delivery to the grantee upon the grantor's death is a valid delivery if the grantor intends by it that the deed shall pass out of his control, but if he does not so intend but merely delivers the deed to the third person as a convenient place of deposit it is not a valid delivery and is not effective to pass title to the grantee.

2. **SAME**—*grantor's intention at time of delivery to third person controls.* The grantor's intention at the time of the delivery to a third person controls, and such intention may be evidenced by acts or words or both, but, however shown, it must appear that the grantor intended to reserve no control over the deed after delivering it to the third person.

3. **SAME**—*after valid delivery the grantor's change of mind has no effect.* If the grantor, at the time of delivering a deed to a third person for delivery to the grantee at the grantor's death, intended to relinquish all control over the instrument, the act of the grantor in subsequently changing his mind and re-possessing himself of the deed does not operate to divest the grantee of title and re-invest it in the grantor.

4. **SAME**—*what is a sufficient acceptance of voluntary conveyance to stranger.* Even though there may be no presumption of an acceptance of a voluntary conveyance where the grantor and grantee occupy no fiduciary relation, yet if the grantee knows that the deed has been executed and delivered to a third person for delivery to him at the grantor's death and expresses his consent thereto in some manner there is a sufficient acceptance.

5. **SAME**—*sale of land in accordance with an executed parol partition conveys title.* Where tenants in common divide the sixty-acre tract they own in common into north and south halves, go into exclusive possession thereof and erect a fence between the halves and thereafter continue in such possession for many years, each paying the taxes, assessed in his own name, on the respective thirty-acre tract of which he is in possession and receiving the rents and profits from it when rented, there is a parol partition, and a deed by one conveying the whole thirty-acre tract in his possession to a third person will pass the title.

APPEAL from the Circuit Court of Douglas county; the  
Hon. FRANKLIN H. BOGGS, Judge, presiding.

H. A. NEAL, for appellant.

EDWARD C. CRAIG, and DONALD B. CRAIG, for appellee.

MR. CHIEF JUSTICE FARMER delivered the opinion of the court:

This is an action of ejectment brought by appellant against appellee in the circuit court of Douglas county. By the first count of the declaration appellant alleges he is the owner of the fee in thirty acres of land described and seeks to recover the same. The second count alleges appellant is the owner of the fee in the undivided one-half of said thirty acres. A trial was had by the court without a jury and a judgment rendered for defendant, from which judgment this appeal is prosecuted.

Both parties claim title to the land through a common source. The thirty acres in controversy is a part of the land that was owned by John Gomel in his lifetime. He died intestate in 1883, leaving appellant, Rama O. Gomel, Orlando Gomel and John L. Gomel, his sons, and Savilla Wheelock, a daughter, as his only children and heirs-at-law. He left surviving him a widow, Harriet, who has since died. Shortly after the death of John Gomel his son John conveyed his undivided interest in the land to Rama, and the daughter, Savilla, conveyed her undivided interest to Orlando. Eighty acres of the land of her husband was assigned to the widow as dower, and said eighty embraced the land here in controversy. Before her death appellant and his brother Orlando purchased the dower interest of their mother in the eighty acres and she executed to them a conveyance therefor. By the conveyances from the widow and two of the children of John Gomel, deceased, his sons Rama and Orlando became the owners each of the undivided one-half of the land left by their father. In December, 1911, Orlando executed a deed to appellee, Er-

nest G. McDaniels, purporting to convey to him the entire thirty acres in controversy. McDaniels was in no way related to Orlando but had cultivated the land in controversy for several years. McDaniels owned a forty adjoining the land in controversy, and from the testimony appears to have been kind and attentive to Orlando, who was a bachelor, living alone a greater portion of the time. A little more than two years before his death Orlando went to an attorney by the name of Winkler and asked him to prepare a deed conveying to McDaniels the thirty-acre tract of land. Winkler looked up the proper description, prepared the deed, which Orlando signed and acknowledged before him, and left it with Winkler to be delivered to the grantee upon the grantor's death. A few days later Orlando went to the same attorney and had him prepare a will, by which he left to his brothers and sister all of his property, not describing the same. After the will was executed it was left with Winkler. About a year later Orlando went to Winkler and asked for his papers. Winkler delivered to him the will and the deed, both of which he kept in his possession until his death. Within a few days after the death of Orlando, Winkler secured possession of the deed and appellee recovered it from him by virtue of a writ of replevin and placed it on record. By virtue of that deed appellee claims title to the land.

Appellant contends (1) that the deed was never delivered; (2) that the conveyance was never accepted by the grantee; (3) that if the deed was delivered and accepted it was only effective to convey the undivided one-half of the thirty acres of land, the contention being that appellant owned the other undivided one-half. Appellee insists the proof shows there was a valid delivery of the deed, that the conveyance was accepted by the grantee, and that it vested in him the title to the entire thirty acres. This last proposition is based upon the contention that there had been a parol partition between Orlando Gomel and appellant, by

which the former took the thirty acres in controversy and the latter thirty acres adjacent to it on the south.

Winkler testified that after the deed was executed he gave it to the grantor and explained to him what was necessary to make it good, and told the grantor he could not keep it among his papers but would have to deliver it to the grantee or to somebody for him, to be delivered at the grantor's death; that the grantor said if that was true he would give the deed to the witness, to be given to the grantee in the event of the grantor's death, and the deed was given to the witness.

By his will Orlando Gomel gave his sister forty acres of land which is no part of the land here in controversy. All the residue of his land he directed his executor to sell at public sale and divide the proceeds equally among his two surviving brothers and his sister. Pursuant to the power conferred by the will the executor advertised the land for sale, and at the sale it was bid off by Rama Gomel, John Gomel and their sister, Savilla Wheelock, and a deed to them was executed by the executor. Afterwards, and before this suit was brought, John Gomel and Savilla Wheelock executed conveyances of their interests in the land in controversy to appellant.

There can be no question as to the rule of law governing the delivery of a deed in escrow and what is necessary to make such delivery effective to pass title. The delivery of a deed by the grantor to a third person for delivery to the grantee upon the grantor's death is a valid delivery if the grantor intends by it that the deed shall pass out of his control and dominion. If he reserves control of it or merely places it in the hands of a third person, not absolutely for delivery but as a convenient place of deposit, it is not a valid delivery and is ineffective to pass title to the grantee. The intention of the grantor at the time of the delivery to the third person may be evidenced by words or acts or by both, but however shown, it must appear that

no control over the deed was intended to be reserved by the grantor after delivering it to the third person. (*Linn v. Linn*, 261 Ill. 606, and cases there cited; also, *DeGraff v. Manz*, 251 id. 531; *Clark v. Clark*, 183 id. 448; *Latimer v. Latimer*, 174 id. 418; *Shea v. Murphy*, 164 id. 614.) A subsequent change of mind by the grantor can not change the original nature and effect of the transaction. *Calleraud v. Piot*, 241 Ill. 120; *Fitzgerald v. Allen*, 240 id. 80; *Maxwell v. Harper*, 98 Pac. Rep. (Wash.) 758; *Arnegaard v. Arnegaard*, 41 L. R. A. (N. Dak.) 258; *Squires v. Summers*, 85 Ind. 253; *Blight v. Schneck*, 51 Am. Dec. (Pa.) 478.

We think the evidence shows the delivery of the deed by the grantor to Winkler was a valid delivery. We find no intimation in it that the grantor then intended to reserve any control over it after that time. He had evidently had the impression when he made the deed that no delivery would be necessary before his death, but when told by his attorney that a delivery to someone for the grantee upon the death of the grantor was necessary, he evidenced his intention to make the deed effective by then delivering it to Winkler with instructions to deliver it to the grantee upon his death. It does not appear from Winkler's testimony that the grantor ever claimed any right to the possession or control of the deed afterwards. He made no demand for the deed at the time Winkler gave it to him. He had left his will with Winkler, and in the neighborhood of a year after the will and deed were executed called on Winkler and asked for his papers. Winkler gave him the will and the deed and he retained the possession of them until his death. At most, the acceptance and retention of the deed by the grantor from Winkler could only indicate he had changed his mind since delivering it to Winkler. Procuring it to be delivered back to him under such circumstances could not affect the validity and effect of the original transaction.

Appellant contends that there was no acceptance of the conveyance by the grantee and that the execution and delivery of the deed to Winkler should be treated as a mere offer to convey, subject to be revoked by the grantor at any time before acceptance. He further contends that the presumption of acceptance attending cases of voluntary settlements between parent and children or persons occupying fiduciary relations toward each other cannot be indulged in this case because no such relations existed between the parties and the conveyance can be considered only as a mere donation or gift. Appellee was not entitled to the possession of the deed or the land until the death of the grantor. Whether he accepted the conveyance could therefore only be evidenced by his knowledge of it and consent to receive it. If it be conceded there is no presumption of acceptance on the ground that the conveyance was beneficial to the grantee, as in cases of voluntary settlement between parent and children, if the testimony of appellee is to be believed he did all that was required or could be done to evidence acceptance in such cases. Appellee testified that in the fall of 1911 Orlando Gomel told him he was going to make him a deed for the land and that if he was down at Winkler's he would do it then. About a year later Gomel talked to appellee about it again, and Gomel said he had fixed that piece of ground as he had told appellee he was going to do. Appellee told him he would be very thankful. On behalf of appellant, Crawford Cash, who was executor of the will of Orlando Gomel, testified that after the death of Gomel, in February, 1914, he had a conversation with appellee, in which appellee said he had attended the State Fair at Springfield with Orlando Gomel in the fall of 1911, and that while they were at the fair Gomel said he was going to give appellee the thirty acres in controversy. Appellee said that this was all that was said between them at the fair, and that in the winter following the deed was made, and that Gomel told him he had it fixed. The wit-



ness testified he asked appellee how Gomel had fixed it, and appellee said he did not know whether by will or deed. Hans McGruder, a son-in-law of appellant, testified he had a conversation with appellee shortly after the death of Orlando Gomel, in which appellee said he hoped one of the heirs would get the thirty acres in controversy who would want to sell it, as he would give a stiff price for it. In rebuttal, appellee testified Cash was mistaken about his saying he talked with Orlando Gomel at the fair in 1911; that he did not go to the fair with Gomel but went with one McShane. He admitted talking with Cash about the deed, and said he told him Winkler had it for delivery, and denied that he told Cash that he did not know whether Gomel fixed the matter by will or deed. He denied having any such conversation with McGruder as that witness testified to, and in view of McGruder's admissions on cross-examination we think very little weight can be given to his testimony. From a consideration of the evidence we cannot say the court was not justified in concluding that appellee knew of the execution and delivery of the deed and agreed and consented to accept the conveyance. If he did, it was an acceptance of it. *Moore v. Flynn*, 135 Ill. 74; *Kingsbury v. Burnside*, 58 id. 310; *Rivard v. Walker*, 39 id. 413; *Winterbottom v. Pattison*, 152 id. 334; *Bryan v. Wash*, 2 Gilm. 557; 9 Am. & Eng. Ency. of Law, 162; 13 Cyc. 571.

Lastly, appellant insists the proof does not sustain appellee's claim that there was a parol partition between Orlando and Rama Gomel of the sixty acres, by which there was a severance of the ownership in possession as tenants in common, whereby Orlando became the sole owner of the north thirty acres, which is the land in controversy, and Rama of the south thirty acres of the sixty, and appellant insists that he was at least entitled, under the second count of his declaration, to recover the undivided one-half of the thirty-acre tract. It is not denied that the law as hereto-

fore held is, that where a parol partition has been made between tenants in common and the premises occupied by the respective parties according to the partition, such partition may be set up as a defense against an action brought to recover possession in violation of the parol partition. (*Sontag v. Bigelow*, 142 Ill. 143; *Tomlin v. Hilyard*, 43 id. 300.) But it is contended the proof of a parol partition was insufficient. It appears from the testimony that the land here in controversy was the north half of sixty acres which was assigned to the widow of John Gomel for dower. Orlando and Rama Gomel by conveyances from the other heirs became the sole owners, as tenants in common, of this sixty acres of land, together with another twenty assigned their mother as dower. In 1890 their mother released to them her dower interest. Orlando at once took exclusive possession of the north thirty of the sixty-acre tract, which is the land in controversy, and Rama took exclusive possession of the south thirty, and at the same time Orlando took exclusive possession of the west half of the twenty acres and Rama of the east half of the twenty. Prior to the release by the widow of her dower the land was assessed in her name, and, as we understand the proof, she paid the taxes on it. After her release of dower to Orlando and Rama their mother's name on the assessor's book of 1890 and the collector's book of 1891 was scratched out and there was written over it in pencil, "Orlando R. Gomel the north half of sixty and Rama O. Gomel the south half." Also there was substituted for their mother's name on the tax books designating the twenty acres, "Orlando R. Gomel the west half and Rama O. Gomel the east half of twenty acres." From that time until his death Orlando paid the taxes on the north thirty acres of the sixty-acre tract. About the year 1890, the exact time not clearly appearing, the two brothers built a fence separating the north thirty from the south thirty of the sixty. Orlando, by himself and his tenants, continu-

ously occupied the north thirty acres and collected and received the rents and profits from it when rented, while Rama did likewise with reference to the south thirty. In 1909 Orlando conveyed to the trustees of schools, for school purposes, an acre of land out of one corner of the west half of the thirty which he was in sole possession of. No one testified to having been present when a parol partition was made between the brothers or to having heard them talk about it after it was made, but the conduct of the parties, as shown by the evidence, for more than twenty years, and the execution of the deed for the thirty acres by Orlando and the deed to the school trustees by him, we think warranted the conclusion of a parol partition. The evidence was substantially of the same character and quite as strong as in the cases of *Sontag v. Bigelow*, *supra*, and *Tomlin v. Hilyard*, *supra*, where the proof of a parol partition was held sufficient. In 21 Am. & Eng. Ency. of Law, 1141, it is said: "On the question whether there has been a partition of common property between co-tenants, evidence is admissible of separate possession of particular portions thereof by the different co-tenants, the recognition of each other's sole interest in such portions, the exercise of rights of sole ownership, or, in short, of any matters which can reasonably throw light upon the question in issue." In 30 Cyc. 164, it is said: "Whether a partition has been made is a question of fact for the decision of the jury, or of the court when it is authorized to discharge the functions of a jury. A partition may be established by circumstantial as well as by direct evidence, and whenever there has been separate and distinct possession in severalty, maintained for a considerable time, with conveyances or a claim of title in severalty, the fact of such possession and the attendant circumstances are admissible in evidence and may justify the jury in presuming a partition, although there is no direct evidence on the subject, and perhaps even where the evidence shows an attempted partition which on

its face, as a matter of law, must be declared insufficient and void."

We cannot say the judgment in this case is contrary to the law and the evidence, and it is therefore affirmed.

*Judgment affirmed.*

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J. W. BLAIR *et al.* Appellants, *vs.* G. FADERER *et al.*  
Appellees.

*Opinion filed October 27, 1915.*

HIGHWAYS—*section 98 of the Roads and Bridges act does not authorize road from two lots of land to public road.* Section 98 of the Roads and Bridges act does not authorize the commissioners of highways to lay out roads for private and public use to connect more than one dwelling or plantation or more than one lot of land with a public highway, even though the two lots of land sought to be served are contiguous forty-acre tracts owned in severalty by different owners, both of whom petition for the road, where one tract cannot be connected with the road except by extending the road through the other tract. (*Funderburk v. Spengler*, 234 Ill. 574, followed.)

APPEAL from the Circuit Court of Clay county; the Hon. J. C. McBRIDE, Judge, presiding.

JAMES H. SMITH, for appellants.

A. N. TOLLIVER, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

On June 9, 1914, J. R. Davis and J. D. Beal petitioned the commissioner of highways of the town of Blair, in the county of Clay, to lay out a road for private and public use along a specified route, which road, the petition alleged, would "connect a lot of land with a public highway" and would "connect the plantations of the petitioners herein

with a public road." The petition described the starting point of the proposed road as a certain point on the line between sections 19 and 20 in the town of Blair, and the route specified extended therefrom in an easterly direction a distance of one and one-half miles to a public road. A particular description of the lot of land or the plantations mentioned in the petition which the proposed road would connect with a public road was not given, but from a survey which was thereafter made at the direction of the commissioner of highways, and from certain agreements made between the petitioners and the commissioner of highways and made a part of the record of the proceedings, it appears that the petitioner J. R. Davis owns in severalty a 40-acre tract of land in section 19 and that the petitioner J. D. Beal owns a 40-acre tract lying immediately east thereof in section 20 of the town of Blair; that the starting point of the proposed road is on the line between these 40-acre tracts, and that the proposed road extends in an easterly direction through the 40-acre tract owned by Beal and through lands belonging to various other persons, including appellants, J. W. Blair and C. W. Davis, to a public highway. On July 25, 1914, the commissioner of highways made a written order, in which, among other things, it was recited that the petitioners, J. R. Davis and J. D. Beal, are the owners of a lot of land, viz., the northwest quarter of the southwest quarter of section 20 and the northeast quarter of the southeast quarter of section 19, in the town of Blair, which the proposed road would connect with a public highway, and after setting out the various steps theretofore taken in the proceedings, it was ordered that the road described in the order be laid out as a road for private and public use. Thereafter J. W. Blair and C. W. Davis filed their petition for a writ of *certiorari* in the circuit court of Clay county to obtain a review of the proceedings which had resulted in the making of an order by the commissioner of highways laying out the road for

private and public use across their lands. As a return to the writ which was issued upon this petition the record of the proceedings taken in laying out the road was certified to the circuit court. Thereupon the petitioners moved the court to quash the record of said proceedings and the commissioner of highways moved the court to quash the writ of *certiorari*. The motion to quash the writ of *certiorari* was sustained and judgment was rendered against the petitioners for costs. From that judgment the petitioners, J. W. Blair and C. W. Davis, have prosecuted this appeal.

The power of commissioners of highways to lay out roads for private and public use is derived from section 98 of the Road and Bridge act of 1913, which provides that "roads for private and public use of the width of three rods or less, may be laid out from one dwelling or plantation of an individual to any public road, or from one public road to another, or from a lot of land to a public road, or from a lot of land to a public waterway, on petition to the commissioners by any person directly interested," and that "upon receiving such petition, proceedings shall be had respecting the laying out of such road as in the case of public roads." In *Funderburk v. Spengler*, 234 Ill. 574, in considering this provision, which was contained in the former Road and Bridge act, we said: "The privilege of having such a road laid out was clearly limited to roads leading from one dwelling or plantation of an individual to a public road, and it could not have been intended to have a wider or more liberal interpretation as to a lot of land so as to include various different tracts. Giving to the statute the strict construction required by the rules of law, it only authorizes the laying out of a road from one dwelling or plantation to a public road, or from one lot of land to a public road, or from one public road to another. It does not contemplate the laying out of a road from a public road to one lot of land and from thence to other lots or tracts. The evident purpose of the statute is to permit the

owner of a dwelling or plantation or a lot of land to secure access to a public road, and not to serve the convenience of a neighborhood by connecting different tracts. It is not a question of the number of petitioners who may be interested in the same dwelling, plantation or lot of land and who are therefore directly interested, and the right of two or more owners of the same tract to join in the petition has been recognized. (*Wright v. Highway Comrs.* 150 Ill. 138.) The statute laying down rules for the construction of statutes authorizes the application of the words of the provision to several persons who are owners of the same tract, but does not warrant an extension of its terms, contrary to the manifest intention of the legislature, to various dwellings, plantations or lots of land."

It is clear from the language above quoted, that, as heretofore construed by us, section 98 of the Road and Bridge act does not authorize commissioners of highways to lay out roads for private and public use to connect more than one dwelling or plantation or more than one lot of land with a public highway. While numerous objections are urged by appellants to the record of the proceedings which resulted in the order laying out the proposed road, the only question necessary to be here considered is whether the purpose of the proposed road is to connect more than one plantation or more than one lot of land with a public road.

The record of the proceedings to lay out the proposed road shows that the premises sought to be connected thereby with a public highway are two contiguous 40-acre tracts of land owned by the respective petitioners in severalty. Appellees seek to sustain the action of the commissioner of highways in laying out the proposed road by contending that as these tracts of land are contiguous they constitute but one lot of land notwithstanding the fact that the owner of one tract has no control or dominion over the other tract, and attempt to distinguish the case at bar from the

*Funderburk* case by pointing out that the tracts of land there involved were not contiguous. What was said in that case will not justify any such distinction. "A lot of land," as that term is used in section 98 of the Road and Bridge act, means a tract of land, and it is essential that the land composing such tract lie in a body; but it is equally essential, in order to come within the meaning of the statute, that the same person or persons have control and dominion over each and every portion of the land comprising the lot of land sought to be connected with the public road, otherwise a connection made at the boundary line of the alleged lot of land would not connect the entire lot of land with the public road but only a portion thereof. Thus, in the case at bar, if the proposed road should extend only to the eastern boundary line of the 40-acre tract owned by Beal, it would connect that tract with the public road but would not connect the 40-acre tract owned by Davis with the public road. In order to also connect the tract owned by Davis with the public road it is necessary, after making the connection with the tract owned by Beal, to extend the road through Beal's land to the eastern boundary line of the tract owned by Davis. It cannot, therefore, be successfully contended that the land owned by Davis and that owned by Beal together constitute but one lot of land within the meaning of the statute. The tracts, so far as connecting them with a public road is concerned, are as separate and distinct as those involved in *Funderburk v. Spengler*, *supra*, and this case can in no logical way be distinguished from the former case.

The judgment of the circuit court is reversed and the cause is remanded, with directions to quash the record of the proceedings brought before it by the writ of *certiorari*.

*Reversed and remanded, with directions.*



JESSE E. HOFFMAN *et al.* Appellants, *vs.* E. W. STEPHENS  
*et al.* Appellees.

*Opinion filed October 27, 1915.*

1. EVIDENCE—*when party should be permitted to testify to conversations.* A competent witness who has testified to certain facts connected with the execution and delivery of a deed and to the change in the name of the grantee should be permitted to testify to conversations with the substituted grantee, some of which were competent as part of the *res gestæ* and others as declarations in disparagement of title.

2. EJECTMENT—*when plaintiff in ejectment need not prove that the defendants sued were in possession.* Where the declaration in ejectment does not show that any person other than the defendants sued was in possession and there is no sworn plea denying possession, it is not necessary that the plaintiff prove possession by the defendants sued.

3. SAME—*what makes a prima facie case.* Plaintiffs in ejectment who prove that a certain person was in possession of the land claiming to be the owner under a deed and introduce in evidence his will devising the land to them make a *prima facie* case, and they are not required to prove title from the government or from a common source as against the defendants, who show no better title.

4. SAME—*judgment cannot be rendered in favor both of the executors and the heirs.* An action of ejectment concerns the legal title, only, and in case the executors and the heirs are parties plaintiff the judgment must be in favor of either the executors or the heirs, according to which has the legal title, but it cannot be in favor of both.

5. SAME—*when testimony taken in former trials is admissible.* Testimony taken in former trials in an ejectment suit is admissible in another trial where the witnesses are dead or beyond the jurisdiction of the court; and this is true even though the testimony on the different trials may be contradictory, as that fact goes merely to the weight of the evidence; but the testimony of a witness in a former trial should not be admitted if he is living and is not shown to be beyond the jurisdiction of the court.

6. INSTRUCTIONS—*an instruction as to effect of impeachment should not name the witness.* An instruction stating the right of the jury to disregard the uncorroborated testimony of a witness who has been impeached should not designate the witness by name, even though he is the only witness whose reputation for

truth is attacked, where there are other witnesses in the case who were contradicted, as a witness may be impeached by contradictory evidence as well as by proof of bad reputation.

7. SAME—*correct instruction, if irrelevant to any issue, should not be given.* An instruction which is not relevant to any issue in the case ought not to be given, even though it states a correct proposition of law.

8. APPEALS AND ERRORS—*rules of law decided on former appeal are conclusive.* Rules of law decided on appeal in an action of ejectment are conclusive on a second appeal in the same case and will not be reconsidered.

APPEAL from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

SAMUEL C. DOOLEY, and JESSE E. HOFFMAN, for appellants.

DEMANGE, GILLESPIE & DEMANGE, and CHARLES M. PEIRCE, for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

This case was before this court on a former appeal. (*Stephens v. Hoffman*, 263 Ill. 197.) There has been a new trial and another judgment against the defendants, from which they have again appealed.

Frank Gillespie, who was held on the former appeal to be a competent witness, testified on the last trial to certain facts and circumstances connected with the execution and delivery of the deed and the change of the name of the grantee. He was asked to tell certain conversations with William Stephens relating to the transaction, but upon objection of the appellees was not permitted to do so. This was error. He was a competent witness in the case and the appellants were entitled to his testimony upon any facts relevant to the issue of which he had knowledge. The statements of William Stephens made during the progress of the transaction were competent as a part of the *res gestæ*,

and his statements made afterwards were competent against his successors in title as declarations in disparagement of his own title.

It is insisted that it appears in the declaration that the premises were in the actual possession of a tenant other than the three defendants; that such tenant in actual possession was a necessary party and was not made party to the suit. The declaration names Hoffman, Dooley, Johnson and ..... defendants, and in two counts alleged that the defendant ..... afterwards entered into the said tenements, and the defendants Hoffman, Dooley and Johnson claim to be the owners and collected the rents from the defendant, etc. This does not show that any person other than the defendants named was in possession of the premises. There was no sworn plea denying possession, and under the statute it was therefore not necessary for the plaintiffs to prove that the defendants sued were in possession of the premises.

Frank Gillespie, a former street railway employee, who was the original grantee in the deed, testified on the trial. Witnesses testified that his reputation for truth and veracity was bad, and the court instructed the jury that if they believed, from the evidence, that the witness Frank R. Gillespie had been successfully impeached on the trial or had knowingly sworn falsely as to anything material to the issue the jury were at liberty to disregard his entire testimony unless corroborated. It was error to give this instruction referring to the witness by name. Though he was the only witness whose reputation was attacked he was not the only witness who was contradicted, and the rule laid down ought to have been made applicable to all the witnesses in the case in the same situation. A witness may be impeached by contradicting him as well as by proof of his bad reputation. To give an instruction of this kind, naming a particular witness, has a tendency to lead the jury to believe such witness, in the court's judgment, is not entitled to credit.

Objection is made to the following instruction given for the appellees:

"That in an action of ejectment prior peaceable possession of the plaintiffs claiming to be the owners in fee, if proved, is *prima facie* evidence of ownership and seizin and is sufficient to authorize a recovery unless the defendants show a better title."

This instruction stated a correct rule of law. *Krause v. Nolte*, 217 Ill. 298; *Chicago Terminal Transfer Railroad Co. v. Winslow*, 216 id. 166.

It is urged on behalf of appellants that the appellees failed to prove title from the government or from a common source. They showed that William Stephens was in possession of the land claiming to be the owner and introduced his will in evidence. This, under the authorities just cited, made a *prima facie* case, and it was not necessary for them to prove title from the government or from a common source as against the appellants, who showed no better title.

Objection is made to an instruction given for the appellees, to the effect that William Stephens' possession in his lifetime was notice to all the world of his rights in the premises. This instruction, while stating a correct rule of law, was irrelevant to any issue in the case and ought not to have been given.

The plaintiffs are all the heirs of William Stephens and the executors of his will. By his will, which was introduced in evidence, he directed that the premises involved in this suit, with other real estate, should be sold by his executors and the proceeds divided among certain of his heirs. Judgment was rendered in favor of all of the plaintiffs. The action of ejectment concerns the legal title, only. If the legal title was in the executors, then there was no right of recovery in the heirs; if it was in the heirs, there was no right of recovery in the executors. The question whether recovery should be in favor of the executors or

of the heirs has not been argued and we do not decide it. The judgment cannot properly be rendered in favor of all.

Cross-errors have been assigned by the appellees on the action of the court in permitting the appellants to read the deposition of William L. Peeler, and they have argued this question as well as the competency of the witness Gillespie. These questions were both decided on the former appeal, and cannot, therefore, be again considered. The rules of law announced by an appellate court in the decision of an appeal or writ of error are conclusive upon a second appeal in the same case. *In re Estate of Maher*, 204 Ill. 25; *Newberry v. Blatchford*, 106 id. 584.

The appellees have also assigned cross-errors on the action of the court in permitting the appellants to introduce the evidence of Ben W. Mason and Charles A. Marshall given on the trial of a former suit brought by Gillespie against the executors of William Stephens' will. Mason had died, and it was proper to prove his testimony taken in the Gillespie case, under the decision in the former appeal. This evidence was in the same situation as the deposition of Peeler. It is objected that Mason testified another time in the Gillespie case and twice in the present case and that his testimony on these different occasions was contradictory. This fact did not affect the competency of the testimony given on any of these occasions. Either party had the right to introduce the testimony given at any or all of these trials, and the question of its consistency went only to the weight of the evidence. Marshall's testimony, however, should not have been admitted. He was living, and it was not shown that he was beyond the jurisdiction of the court. No reason is given why his presence might not have been secured at the trial or his deposition taken.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

GEORGE C. MITCHELL, Appellant, vs. THE ART INSTITUTE  
OF CHICAGO, Appellee.

*Opinion filed October 27, 1915.*

1. PRINCIPAL AND AGENT—*an agent verbally authorized to find purchasers cannot make binding contract to sell land.* An agent must be authorized in writing before he can make a binding contract for the sale of land of his principal, even though his performance of a verbal contract to find purchasers may entitle him to commissions.

2. SPECIFIC PERFORMANCE—*when Statute of Frauds is a good defense.* In the absence of any question of estoppel the Statute of Frauds is a good defense to a suit to specifically enforce a written contract for the sale of land executed by an agent having no written authority from the owner.

3. APPEALS AND ERRORS—*when costs cannot be complained of on appeal.* The awarding of costs for the taking of evidence before the master is within the discretion of the trial court, and that discretion will not be reviewed except for abuse, but the question is not preserved for review if no motion to re-tax costs is made in the court below.

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

GEORGE C. MITCHELL, *pro se*, (MORTON T. CULVER, of counsel,) for appellant.

MILLER, STARR, PACKARD & PECKHAM, (CECIL BARNES, of counsel,) for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Appellant, George C. Mitchell, complainant in the court below, filed a bill in chancery in the circuit court of Cook county against the Art Institute of Chicago, a corporation, appellee in this court, to compel the specific performance of a contract for the sale of certain lots in Grant's addition to Evanston, owned by appellee, which contract had been executed by appellant as purchaser and by Walter M. Mitchell, brother of appellant, as agent for appellee, on

January 27, 1914. Appellee answered, denying that it had entered into any written agreement with the complainant for the sale of the lots in question; denying that Walter Mitchell was its authorized agent, or that he ever had any written authority, or any authority whatsoever, to sign or agree to any contract for the conveyance of said lots on behalf of appellee, and denying any knowledge of the terms of the contract save as it was informed by said bill. It was also set up in the answer that on January 27, 1914, the Art Institute was under contract to convey a portion of said real estate to parties other than appellant, and that before it had any knowledge of the contract of appellant it had conveyed, or contracted to convey, to parties other than appellant, all the real estate mentioned in the bill of complaint.

A general replication was filed to the answer and the cause was referred to a master in chancery to take the proofs. Evidence was heard, and thereafter the master reported, finding, among other things, that on January 27, 1914, and prior thereto, appellee, the Art Institute of Chicago, was the owner of the real estate in controversy; that said Art Institute did not at any time designate or appoint in writing said Walter M. Mitchell as its agent to sell said property, or at any time in writing empower or authorize him to sign or affix its name to any writing for or in its behalf; that he was not authorized or empowered by any writing to make, execute or sign, as agent of the Art Institute, the contract in writing entered into by said George C. Mitchell and sought to be specifically enforced; that the consideration set forth in the contract, being \$6600, nor any part thereof, had been tendered by the said George C. Mitchell, or anyone for him, to the Art Institute, and that the latter had not received said amount or any part thereof; that said George C. Mitchell had not at any time been in possession of said real estate nor anyone for him, and neither he nor anyone for him had made, or caused to

be made, on said real estate, or any part thereof, any lasting or valuable improvements. The report found the equities with the defendant, the Art Institute, and recommended that the bill of complaint be dismissed for want of equity.

Objections were filed to the master's report; that the findings of the master were contrary to the law and the evidence; that it was immaterial whether or not Walter M. Mitchell had any authority in writing from appellee to make the contract he did, or whether the complainant in the bill had paid or tendered any part of the consideration provided in the contract for the lots or taken possession thereof or made improvements thereon, for the reason that the Art Institute had made an agreement with Walter M. Mitchell that he was to sell the lots in question and other lots, and that he had sold for said Art Institute certain other lots, and said agreement was therefore in part consummated. The objections were overruled, and exceptions to the master's report of the same nature as the objections were then filed, which, on a hearing, were overruled by the chancellor and a decree was entered dismissing the bill of complaint for want of equity. Appellant has appealed to this court, and assigns as error that the decree of the trial court was contrary to the law and the evidence, and that the trial court erred in overruling the exceptions to the master's report.

It appears from the evidence that appellee, the Art Institute, was the owner not only of the lots in controversy but of several other lots in the same vicinity, and that Walter M. Mitchell, who was a real estate dealer, had at different times prior to the transaction in question negotiated sales of certain lots other than those involved in this suit at a price agreed upon, and the Art Institute had conveyed such lots or entered into contracts to convey with the purchasers produced by said Mitchell and he was paid a commission for effecting such sales. The officers of the Art Institute always refused, however, to give any written op-



tions to Mitchell or do any more than accept such purchasers as he procured. Early in January, 1914, Mitchell applied to the officers of the Art Institute and requested that he be given the agency to dispose of the lots remaining unsold in Grant's addition. Pursuant to whatever arrangement was then made he did effect sales of certain lots. There is a sharp conflict in the evidence as to whether Mitchell, as claimed by him, was given the exclusive agency to sell the remaining lots, including the lots in controversy, or whether the Art Institute, as its secretary and another witness testified, had the right to sell through other agents as well. The contract sought to be enforced recited that it was an agreement by George C. Mitchell to purchase the premises in controversy, and that Walter M. Mitchell, as agent, agrees to sell and convey the lots. It was signed, "George C. Mitchell," and "Walter M. Mitchell, Agent." The name of the owner of the property, the Art Institute of Chicago, nowhere appears in the contract.

The principal question is whether the contract in question is contrary to the Statute of Frauds. If so, it cannot be enforced.

While it may be true, as claimed by the appellant, that the appellee, through its officers, had verbally agreed to sell and convey the real estate in question to such purchaser or purchasers as might be found by Walter M. Mitchell, and while such verbal contract might be the basis of a suit by Mitchell for his commissions in case he found purchasers who were willing and able to buy the property on the terms proposed, such verbal agreement, alone, there being no authority in writing from the owner to the agent to make a contract, is not sufficient upon which to base a suit for specific performance of a contract entered into by the agent to sell the property. An agent for the sale of real estate has no authority to bind the owner thereof by entering into a contract for the sale of such real estate unless the agent has been lawfully authorized in writing so

to do. (Hurd's Stat. 1913, chap. 59, sec. 2; *Hughes v. Carne*, 135 Ill. 519.) In the absence of any question of estoppel the Statute of Frauds is a good defense to a suit to specifically enforce a contract made by an agent to sell land where the agent had no written authority to make it. (*Reynolds v. Wetzler*, 254 Ill. 607; *Kesner v. Miesch*, 204 id. 320.) In the case at bar it is not claimed that there was any ratification by the appellee, nor payment or taking possession of the property or making of improvements by appellant, that would take the case out of the Statute of Frauds. Part of the purchase money was paid by appellant to the agent who signed the contract without authority, but no part of it was paid or tendered to appellee.

Appellant claims that the Art Institute, through its officers, contracted with Walter M. Mitchell to dispose of all its lots in the vicinity of the lots in question to such purchasers as he might produce; that Mitchell did produce purchasers for certain of the lots, and that this was sufficient part performance of the contract to take the contract out of the Statute of Frauds. As stated above, there is a conflict in the evidence as to the terms of the agreement made between appellee and Walter M. Mitchell as to producing purchasers for the lots in Grant's addition, and in any event a court of equity will not decree the specific performance of a contract the existence of which depends upon parol testimony, unless the proof is clear and conclusive of its existence and terms. (*Reynolds v. Wetzler*, *supra*, and cases cited.) The contract sought to be enforced was clearly contrary to the Statute of Frauds and appellant was not entitled to have it specifically enforced.

Complaint is made in the argument of appellant as to certain costs made by appellee in taking evidence before the master, which evidence is claimed to be irrelevant to the issues involved. The evidence in question was that appellee had sold the real estate in question through another agent prior to the date of the contract made by Walter

M. Mitchell, as agent. The awarding of costs was within the discretion of the trial court. (Hurd's Stat. 1913, chap. 33, sec. 18.) The exercise of that discretion will not be reviewed except for abuse. (*Rogers v. Tyley*, 144 Ill. 652.) No motion was made to re-tax costs, and consequently no ruling made that has been preserved for our consideration. We are unable to say that the awarding of costs against the complainant on the dismissal of his bill was an abuse of discretion.

We think the decree of the circuit court was right, and it will be affirmed.

*Decree affirmed.*

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JOHN D. CASEY, Admr., Defendant in Error, vs. THE CHICAGO RAILWAYS COMPANY, Plaintiff in Error.

*Opinion filed October 27, 1915.*

1. NEGLIGENCE—when proof of habitual caution tends to raise presumption of due care. In an action against a street railway company to recover damages for the alleged negligent killing of a boy about nine years old, if there were no eye-witnesses to the accident and no facts susceptible of proof to show how the fatality occurred, proof that the deceased was habitually prudent and cautious tends to raise a presumption that he was in the exercise of due care and caution for his safety at the time of the accident and justifies the submission of that question to the jury.

2. SAME—there must be some evidence tending to show negligence by the defendant. The mere facts that a boy was killed by a street car under circumstances which are unknown to anyone, and that proof is made that the boy was habitually prudent and cautious, do not authorize a recovery of damages from the street car company, where there is no evidence tending to show that the company was in any manner guilty of negligence.

FARMER, C. J., dissenting.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGOORTY, Judge, presiding.

J. R. GUILLIAMS, FRANK L. KRIETE, and CHARLES L. MAHONY, (W. W. GURLEY, of counsel,) for plaintiff in error.

CRUICE & LANGILLE, (DANIEL L. CRUICE, of counsel,) for defendant in error.

Mr. JUSTICE COOKE delivered the opinion of the court :

Solomon Morris, a boy eight years and eleven months of age, was found dead upon West Twelfth street, in the city of Chicago, on the night of October 10, 1911, supposedly having been killed by one of the street cars of the Chicago Railways Company. John D. Casey, administrator of the estate of Solomon Morris, secured a judgment for \$2500 against the Chicago Railways Company for the death of his intestate, in the circuit court of Cook county. This judgment was affirmed by the Appellate Court for the First District, and the record of that court has been brought here for review by writ of *certiorari*.

At the close of defendant in error's case, and again at the conclusion of the whole case, the court overruled the motion of plaintiff in error for a directed verdict, and this action of the court is assigned as error.

The declaration contained eight counts. The first, second, third and sixth counts charged, generally, that the defendant carelessly and negligently drove and propelled its car so that it caused the death of Solomon Morris. The fourth count charged that the car was negligently operated at a high, rapid and excessive rate of speed, causing the fatality. The fifth count charged the negligence to consist of the failure of the defendant to keep a proper lookout, and the seventh and eighth counts that defendant failed to comply with the provision of an ordinance of the city of Chicago requiring street cars to be operated at night with brightly lit headlights from the front end of each car.

There were no eye-witnesses, and no witness testified either to what the motorman of the car in question or defendant in error's intestate did, or what either failed to do, prior to or at the time of the occurrence. The body of the deceased was found near the intersection of Lincoln and West Twelfth streets. West Twelfth street, in this section of the city, is an unusually wide street. On the north side of the street, south of the sidewalk, is a paved driveway. Along the south side of this pavement is the west-bound track of the Chicago Railways Company. Immediately south of the track is a parkway, in which are planted small trees and shrubbery. South of the parkway is a broad driveway or boulevard. South of the boulevard is another parkway, and south of that parkway is another paved driveway, on which is located the east-bound track of the Chicago Railways Company. The south rail of the west-bound track of the street railway is located about two or three feet north of the north edge of the parkway. Lincoln street is a north and south street intersecting West Twelfth street. The first street east of Lincoln street which intersects West Twelfth street is Wood street. There is a long block between Lincoln and Wood streets, and in the middle of this block there is a break in the two parkways sufficient to enable teams to drive from the boulevard onto the pavements wherein the street car tracks are located, but the evidence discloses that there is no sidewalk crossing at this break in the parkways for the use of pedestrians. The next street east of Wood street which intersects West Twelfth street is Paulina street. The first street south from West Twelfth street is Washburn avenue, which runs east and west. The deceased lived with his parents on Washburn avenue, near the corner of that avenue and Wood street. He left his home on the evening in question about eight o'clock, in company with his sister. They went on Washburn avenue to Wood street and from Wood

street to the southeast corner of Wood and Twelfth streets, where the deceased stopped and entered into a game with some little boys of his acquaintance. His sister remained with them until about 8:30 o'clock, when she returned home. After she left, deceased went with one of the boys with whom he had been playing to the northeast corner of Paulina and Twelfth streets, where they remained for a few minutes. The boy who accompanied the deceased then went into a moving picture theatre located there, and that is the last time anyone saw the deceased alive. His body was found near the intersection of Lincoln and Twelfth streets, about two blocks west of where he was last seen alive. From the condition of the south rail of the west-bound track it was evident that the body had been dragged from a point near the break in the parkway, in the middle of the block between Lincoln and Wood streets, to a point beyond the intersection of Lincoln and Twelfth streets. The body was found about 11:00 o'clock that evening, and upon the matter being reported to the offices of the Railways Company an examination of the Twelfth street cars was made as they came into the barn, and the only car which showed any evidence of having come in contact with any body on that evening was car No. 4297. This was a small car, known as a single-truck car. Around the truck is built a guard-rail. Upon the guard-rail, on the side of the car which would be next the parkway as it traveled west on West Twelfth street, and upon the brake-shoe on that side of the car, blood and some particles of flesh were found. The records of the company, together with the testimony of the motorman of this car, disclosed that this car passed Wood and Lincoln streets on the night in question about 9:40 o'clock, and if this is the car which caused the death of the deceased he was killed at that time, as on the next trip the car was blocked at that point about 11:00 o'clock as the result of the previous finding of the body.

There being no eye-witnesses and no facts susceptible of being proven which would in any way disclose how the fatality occurred, defendant in error proved the habits of the deceased as to care, caution and prudence, as tending to raise the presumption that he was in the exercise of due care and caution for his own safety at the time he was killed. Plaintiff in error contends that this proof was not sufficient to show that deceased was in the exercise of ordinary care for his own safety, and insists that mere proof of the habits of the deceased, without proof of other circumstances upon which to predicate care in the particular case under investigation, is not sufficient to establish the exercise of ordinary care. It was necessary for defendant in error to allege and prove that his decedent was in the exercise of due care and caution for his own safety at the time of the accident. In cases where there are no eye-witnesses to the occurrence this allegation cannot be proven by direct testimony, but it still devolves upon the parties seeking recovery to establish the exercise of ordinary care on the part of the deceased by the highest proof of which the case is capable. (*Collison v. Illinois Central Railroad Co.* 239 Ill. 532; *Stollery v. Cicero and Proviso Street Railway Co.* 243 id. 290; *Newell v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 261 id. 505.) The highest proof of which the case is capable may consist of other circumstances than the habits of the deceased which would tend to raise the presumption that the deceased was in the exercise of due care and caution at the time for his own safety. Where it is possible, such circumstances must be shown. The absence of such circumstances does not preclude a plaintiff, however, and if the case is not susceptible of any higher proof, then the presumption that the deceased was in the exercise of ordinary care and caution for his own safety at the time of the accident is sufficiently raised by proof that he was habitually careful, prudent and cautious in his conduct. If the deceased was habitually

prudent, careful and cautious it tended to raise the presumption that he was in the exercise of due care and caution at the time he received the injury which resulted in his death. (*Chicago, Rock Island and Pacific Railway Co. v. Clark*, 108 Ill. 113; *Toledo, St. Louis and Kansas City Railroad Co. v. Bailey*, 145 id. 159.) As the proof made relative to the habits of the deceased tended to raise this presumption it was sufficient to go to the jury.

Another allegation in the declaration, and one which it was necessary for defendant in error to prove, was that the death was caused by reason of the negligence of plaintiff in error. No proof whatever was made of the negligence alleged in the declaration. The motorman and conductor of car No. 4297, which it is contended killed the boy, were placed upon the stand by the defendant in error. The motorman testified that on the trip in which he passed Wood and Lincoln streets at about 9:40 o'clock he did not notice any boy or anyone on or near the track and did not observe that his car struck or ran over any object whatever. The conductor testified that he felt no unusual movement of the car which would indicate that the car had run over anyone. The motorman testified that in his judgment he was running at the rate of about seven or eight miles an hour when he crossed these streets on that trip, although he did not claim to have any positive or distinct recollection of the rate of speed. There was no direct proof and no facts proven from which it could be inferred that plaintiff in error was in anywise negligent or that this fatality was the result of any negligence on its part. The mere fact that the boy was killed does not impute negligence to plaintiff in error, and it does not follow, in the absence of eye-witnesses or any direct proof as to the occurrence, that plaintiff in error was negligent merely because proof on the part of defendant in error tended to raise the presumption that the deceased was in the exercise of due care and caution for his own safety. The person killed might be in



the exercise of due care and caution for his own safety and still the death be the result of an accident for which no one is to blame.

Because of the failure of defendant in error to make any proof tending to show negligence on the part of the plaintiff in error the court erred in refusing to give the peremptory instruction as requested by plaintiff in error.

Complaint is made of the refusal of the court to give an instruction designated as defendant's instruction 25. This instruction was properly refused as it was not based on any evidence in the case.

For the reason indicated, the judgments of the Appellate and circuit courts are reversed and the cause is remanded to the circuit court for a new trial.

*Reversed and remanded.*

Mr. CHIEF JUSTICE FARMER, dissenting.

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ROBERT E. ACKERBERG, Appellee, vs. CHARLES A. DIES  
*et al.* Appellants.

*Opinion filed October 27, 1915.*

1. SPECIFIC PERFORMANCE—*when decree may require execution of deed with release of homestead.* In decreeing specific performance by husband and wife of a contract by them to convey the premises by warranty deed, with a "waiver and conveyance of all estate of homestead therein," the court may require the execution of a deed with release of homestead, notwithstanding the contract was not acknowledged. (*Hedrick v. Donovan*, 248 Ill. 479, adhered to.)

2. SAME—*when the court may order defendants to furnish title guaranty policy.* If the defendants to a bill for specific performance agreed in their contract to furnish a title guaranty policy, it is incumbent upon them, if it is beyond their control to perform in that respect, to prove the fact, and in the absence of any proof by them it is not error for the court, in decreeing specific performance, to require them to furnish the policy, or in default to authorize the complainant to procure it and deduct the cost.

3. *SAME*—a decree should not leave compliance optional with complainant. A decree for specific performance should not leave it optional with the complainant whether he will comply with the contract but should provide for payment within a short day, and in default of payment within the time specified that all right and interest of the complainant under the contract be extinguished.

4. *SAME*—complainant not entitled to credit for payments on costs not properly taxed. The complainant in a bill for specific performance is entitled to credit for any advancement by way of costs properly taxed where he is successful in his suit, but until the compensation of the master has been regularly fixed and the fees of the stenographer properly certified and allowed he is not entitled to credit for any payment he has made to be applied on such fees.

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

VINCENT D. WYMAN, CHARLES E. CARPENTER, and OTTO W. JURGENS, for appellants.

ALFRED A. NORTON, (ALBERT G. MILLER, of counsel,) for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Cook county requiring Charles A. Dies and Fredricka Dies, appellants, to specifically perform their contract for the sale of real estate to Robert E. Ackenberg, the appellee. The contract was entered into July 3, 1914. By its terms appellants agreed to sell and convey to appellee the real estate described therein, situated in the city of Chicago, for the sum of \$9225. Of this amount \$200 was paid upon the execution of the contract, and it was agreed that the sum of \$3025 should be paid within five days after the title had been examined and found good. The residue of the purchase price was to be paid by the assumption of a mortgage for \$3500 then existing and by appellee giving a second mortgage to secure notes for the remainder of \$2500, the contract containing a provision for a rebate of \$200 in case the re-

mainder of \$2500 should be paid in cash instead of by notes secured by mortgage. The contract provided that appellants should furnish a merchantable title guaranty policy within a reasonable time. On the day following the execution and delivery of the contract appellant Charles A. Dies informed the agent through whom the sale had been negotiated that he would not close the deal. Thereafter, on successive dates, appellee demanded the title guaranty policy provided for by the contract, together with a deed to the premises, and offered to pay the amount due under the terms of the contract. It was stipulated on the hearing before the master that at the time the contract was made, and at all times thereafter, the premises in question constituted the homestead of appellants. The contract provided that appellants should execute and deliver to appellee a good and sufficient warranty deed conveying to appellee a good title to the premises with "waiver and conveyance of all estate of homestead therein." The contract was not acknowledged by appellants. The cause was referred to the master in chancery, who took the proofs and reported his finding for appellee, recommending that a decree be entered as prayed. The court overruled exceptions to the report of the master and entered a decree requiring appellants, within ten days, to deliver appellee a merchantable title guaranty policy guaranteeing title in appellants to the premises, and to execute, acknowledge and deliver a good and sufficient warranty deed conveying to appellee the premises in question, including the release and waiver of the right of homestead, subject to the mortgage for \$3500 to be assumed by appellee, and to deliver said deed to appellee upon the payment to them of \$5325 in cash, less \$124.30 due appellee from appellants as costs of suit, master's fees and stenographer's fees, or upon appellee paying appellants \$3025 in cash, less said amount of \$124.30, and delivering his two promissory notes for \$1000 and \$1500, respectively, payable to appellants on or before one and two years, respectively, from July 3, 1914, secured by a

mortgage or trust deed upon the premises in question. The decree further provided that upon the failure or default of appellants to execute, acknowledge and deliver to appellee a deed and a merchantable title guaranty policy within ten days, then the master in chancery should execute and deliver to appellee a deed on behalf of the appellants to the premises, subject to the mortgage for \$3500, upon appellee paying the master \$5325 in cash, less the amount expended by him in securing a merchantable title guaranty policy guaranteeing appellants' title to the premises, and also less the amount of \$124.30 costs, etc., or upon appellee paying in cash \$3025, less \$124.30, and also less the amount expended by him in procuring a merchantable title guaranty policy, and executing promissory notes aggregating \$2500, secured by trust deed or mortgage on the premises in question.

Appellants urge as grounds for reversal, first, that there was no proof of the ability of the appellee to perform on his part; second, that the court erred in decreeing a conveyance which included a release of homestead and the acknowledgment thereof; third, that it was error to require appellants to furnish a title guaranty policy, as that required them to procure an act to be done by a person or corporation over whom they have no control; fourth, that the decree leaves it optional with appellee to perform; and fifth, that no master's and stenographer's fees having been taxed, it was error to order a deduction of \$124.30 as costs of suit, master's fees and stenographer's fees, from the purchase price.

The master found and reported that appellee was at all times able and ready to perform his part of the contract, and we think this finding in the report and in the decree is fully justified by the evidence.

The principal point raised and argued by the appellants is, that as the contract which provided for the conveyance of the homestead estate was not acknowledged the decree should not have provided for a release of the homestead and an acknowledgment thereof. Appellee, in his contention

that the decree properly required the conveyance together with the release and waiver of the homestead estate and an acknowledgment thereof, relies upon *Hedrick v. Donovan*, 248 Ill. 479. Appellants rely upon *Stodalka v. Novotny*, 144 Ill. 125, and, in effect, ask us to overrule the holding in *Hedrick v. Donovan*, *supra*. This identical question was involved in *Hedrick v. Donovan*, and was there decided contrary to the contentions of appellants. We adhere to the decision arrived at in that case, and therefore hold that that part of the decree requiring appellants to make the conveyance, together with the release and waiver of their homestead estate, was proper.

Appellants by their contract agreed to furnish appellee, within a reasonable time after the execution of the contract, a merchantable title guaranty policy, and the decree requires such policy to be furnished and delivered to appellee. Appellants offered no proof whatever on the hearing before the master. It does not appear whether or not they are in possession of a title guaranty policy which they may transfer to appellee, nor does it appear whether there is any firm or corporation from whom such a policy can be procured. The record is silent upon this question. Appellants agreed to furnish and deliver to appellee such a guaranty policy, and if it was beyond their control to perform in this respect it was incumbent upon them to make proof to that effect. Having failed to do so, it was not error for the court to require them to perform the contract as it was made, and in case of their failure to furnish such a title guaranty policy, to permit appellee to procure such a policy and deduct the expense of procuring it from the purchase price.

The contract provided that the purchase price should be paid within five days after the title had been examined and found good. The decree should not leave it optional upon the part of the appellee to comply with its terms or not, as he may choose. The payments provided by the decree to be made by appellee were due and payable to appellants im-

mediately upon the entry of the decree, and the decree should have provided a short day within which such payments should be made by appellee, and further, that in default of payment within the time specified, all right and interest of appellee under the contract should become extinguished. (*Allison v. Clark*, Breese, 348; *Thayer v. Star Mining Co.* 105 Ill. 540.) The decree should be modified in this particular.

Attached to the report of the master, and unsigned and uncertified, was a bill for the master's and stenographer's fees, amounting to \$86.25 for the master and \$23.25 for the stenographer. The statute was not complied with in regard to certifying to the necessity of the employment of a stenographer or in procuring an allowance for the compensation of the master. It does not appear that compensation for the master was fixed or any proper allowance for stenographer's fees made and taxed as costs, and it was error for the court to allow appellee to deduct the sum of \$124.30 as costs, master's fees and stenographer's fees from the purchase price. Appellee is entitled to credit for any advancement by way of costs properly taxed, but until the compensation of the master has been regularly fixed and the fees of the stenographer properly certified and allowed, appellee is not entitled to credit for any payment he has made to be applied upon such fees.

The decree is erroneous in the two particulars pointed out; in all other respects it is proper. The decree is reversed and the cause remanded, with directions to enter a decree in accordance with the views herein expressed, providing for a short day within which the appellee shall be required to pay the amount found due under the contract, fixing the fees to which the master is properly entitled, to be taxed as costs, and fixing the total amount of all costs paid by appellee which he is entitled to deduct from the purchase price. The costs of this appeal shall be taxed one-half to appellants and one-half to appellee.

*Reversed and remanded, with directions.*

RUSSELL D. HILL *et al.* Appellants, *vs.* CURTIS N. KIMBALL  
*et al.* Appellees.

*Opinion filed October 27, 1915.*

1. *HIGHWAYS—difference between a common law and a statutory dedication.* A statutory dedication vests the legal title to the ground set apart for public purposes in the municipal corporation in trust for the public, while a common law dedication leaves the title to such ground in the original owner, charged, however, with the public easement.

2. *SAME—effect where streets and alleys in statutory plat are vacated by ordinance.* Where the streets and alleys shown on a statutory plat are vacated by ordinance, the fee thereof reverts to the dedicator, his heirs and assigns, and not to the abutting lot owner and his grantees, and neither the legislature nor the city can divest him of such title.

3. *SAME—what does not affect validity of vacation proceedings.* The power of a city to vacate streets and alleys must be exercised in the public interest and not solely to benefit private parties; but the validity of vacation proceedings is not affected by the fact that the land embraced within the street or alley vacated reverts to the dedicator or the adjoining owner and becomes private property.

4. *SAME—parol evidence not admissible to show that vacation ordinance was for private benefit.* Parol evidence is not admissible to show that a vacation ordinance was passed for private benefit, particularly where the ordinance recites that the streets and alleys are no longer required by the public and that the public interest will be subserved by their vacation.

5. *SAME—when property owner is entitled to damages for vacating streets and alleys.* If property sustains a special and peculiar damage from the vacation of streets and alleys the owner is entitled to damages even though the property does not abut upon the streets or alleys vacated, but it is not essential that such damages be ascertained before the vacation.

6. *INJUNCTION—when property owner is not entitled to injunction against vacating alley.* One whose property abuts upon an alley shown on a statutory plat may be entitled to damages for the closing of the alley in pursuance of a vacation ordinance regularly passed by the city in compliance with the statutory requirements, but he is not entitled to injunctive relief.

7. *SAME—what should be considered where mandatory injunction is asked for.* Where a mandatory injunction is asked for, the

court should consider the inconvenience and damage that will result to the defendant as well as the benefit to accrue to the complainant from granting the writ, and must determine, in the exercise of a sound discretion, whether the writ shall issue.

APPEAL from the Circuit Court of Lake county; the Hon. CLAIRE C. EDWARDS, Judge, presiding.

MCCULLOCH & MCCULLOCH, and RALPH J. DADY, for appellants.

CHARLES L. BARTLETT, SHERMAN C. SPITZER, ROBERT HUMPHREY, ELAM L. CLARKE, and SAMUEL S. HOLMES, for appellees.

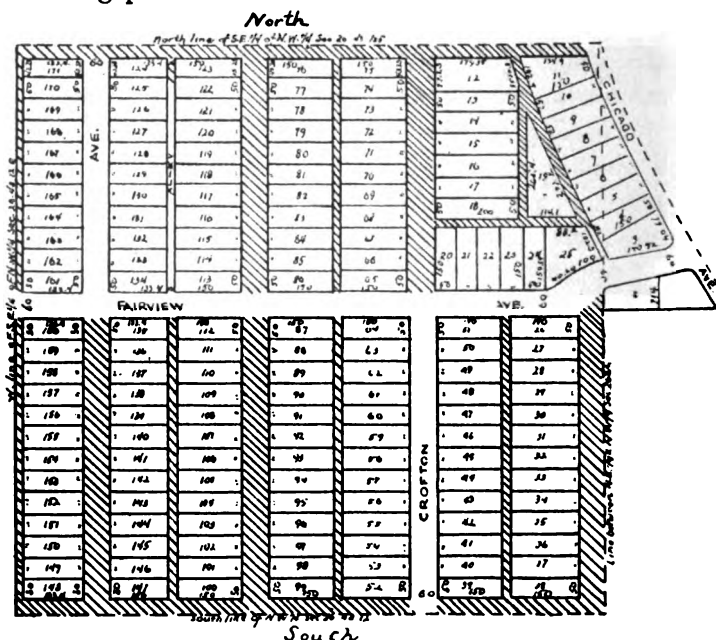
Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill filed by appellants in the circuit court of Lake county for a mandatory injunction, praying that a certain ordinance passed by the city council of Highland Park purporting to vacate certain streets and alleys in a certain subdivision in said city be held null and void, and that appellees be enjoined from interfering with or obstructing access to or egress from said vacated streets and alleys. Appellees filed their answer, and after a hearing had before the chancellor the court entered a decree dismissing the bill for want of equity. From that decree this appeal has been taken.

The alleys and streets in question are in Hitch's Fairview subdivision in said city, platted in 1895. It was stipulated during the trial that said plat constituted a statutory dedication of all the streets and alleys shown thereon, to the public, and that said dedication was accepted and said streets and alleys used as such by the public and abutting owners. Shortly after the platting, the owner, Hitch, conveyed all the premises in said subdivision by metes and bounds to Axel Chytraus, and by *mesne* conveyances the title to lots 2, 3, 4 and 25 became vested in 1896 in appel-



lant Hill. The title to lots 5 and 6 became vested in the same year in appellant Ellen C. Green, who is the mother of Hill's wife. April 3, 1906, the city council of Highland Park, on Hill's request, vacated the alley which ran between lots 3, 4 and 25, and Hill thereupon caused the lots and the portion of the alleys vacated to be re-platted. April 15, 1910, the city council of Highland Park passed an ordinance vacating certain streets, avenues and alleys in said subdivision, including the alley which ran back of lots 25, 5 and 6, and also Oakdale avenue, which ran south from a point directly in front of lot 25. Hitch's Fairview subdivision (with the streets and alleys vacated by the ordinance of April 15, 1910, indicated by shading,) is shown on the following plat:



By various conveyances practically all of the subdivision except that owned by appellants had been acquired by appellee Curtis N. Kimball previous to the institution of

this litigation. In April, 1910, Chytraus conveyed to one Weiboldt all his reversionary interest in the streets and alleys in said subdivision, and Weiboldt conveyed to said Kimball all those streets and alleys, and parts thereof, vacated by said ordinance. Kimball afterwards conveyed to the appellees Charles Yeomans and Maud G. Yeomans, for \$10,000, a tract covering substantially lots 7 to 15, inclusive, and the north part of lot 19, with the alleys originally platted between said lots. Kimball also conveyed to appellee Arthur G. Brown, for \$6500, a tract covering substantially lots 16 to 24, inclusive, except the north part of lot 19, and including the portions of the alleys as originally platted between or immediately adjacent to the boundaries of said lots.

The record shows that from the time of the original platting of this property to the date of the vacation ordinance,—about fifteen years,—some ten of the 171 lots of said subdivision had been sold, six of this number being owned by appellants. It appears, also, that after it was originally platted, wooden sidewalks were built along most of the streets so platted. Before the beginning of this litigation practically all of them had rotted away. The evidence tends to show that most of the streets and alleys at the time of the passage of the vacation ordinance were little used as public thoroughfares, many of them being grown up with saplings, brush and weeds. The evidence is also to the effect that a considerable portion of the city of Highland Park is made up of expensive residences, built upon large tracts of ground, many of them without alleys in the rear; that the possibility of causing the land in this subdivision to be sold in tracts of several acres each and built up with large residences was the chief reason which caused Kimball, after the streets and alleys had been vacated by the said ordinance of April 15, 1910, to purchase this property and improve it; that after the purchase of this property he caused to be constructed in Fairview ave-

nue water and sewer mains, macadamized said avenue and put down a cement sidewalk on one side, at a total cost to himself of over \$13,000, and had done other work on the subdivision amounting to several thousand dollars. The testimony shows that Mrs. Green erected a frame residence on her lots 5 and 6 in said subdivision in 1907 and lived there during the following winter and the next year; that since then the property has been leased to tenants, appellee Yeomans occupying the house during a part of the years 1909 and 1910; that there was a gate opening from the rear of these lots onto the alley as originally platted; that while Mrs. Green lived there this gate was used in going out and passing through the alley; that appellant Hill, in the summer of 1906, after he had purchased lot 25, built a barn thereon, twenty-seven by forty feet in size; that he had used said barn for residence purposes, living there himself three summers; that since then it has been rented at times to tenants; that while he lived there he made use of the alley in the rear of his property; that he had hauled lumber and wire through the alley and had built a sewer in the alley running parallel to Fairview avenue, north of said lot 25. His testimony was to the effect that the vacating of the alleys next to his and Mrs. Green's lots lessened the value of the property. There is other testimony in the record, given on behalf of appellees, that tended to show that the property of appellants was not injured in value by the vacation of the streets and alleys in question. Yeomans and Brown testified that since they had purchased their tracts from appellee Kimball they had improved the property by grading, tiling and setting out trees but had erected no buildings; that they intended to build on the property but had not done so because of the starting of this litigation. Both Hill and Mrs. Green testified that they knew nothing about the vacation ordinance until several months after it was passed, being out of the State at the time, Hill learning of it in June or July, 1910, and Mrs. Green a

month or two later. They made no formal objection to the vacation ordinance until June 11, 1912, when they joined in filing in the recorder's office of Lake county a notice, in which they stated that it was null and void and notified all parties to refrain from obstructing said alleys and streets so attempted to be vacated. No further action was taken by them until the bill of complaint in this case was filed, July 8, 1913.

Counsel for appellants strongly urge that the vacation ordinance in question is so grossly unreasonable as to render it void. "The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restriction, vacate or discontinue the public easement in them or invest municipal corporations with this authority. But the power to vacate streets and public places is not inherent in a municipality by reason of its creation and existence, nor is it implied from the fact that it is vested with general control over such streets and places. The power must be expressly conferred by legislative enactment or must be necessary to the exercise of some power expressly conferred, and any requirements imposed by statute must be substantially complied with." (3 Dillon on Mun. Corp.—5th ed.—sec. 1160.) The doctrine just stated has been quoted with approval by this court in *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, and other cases. (See to the same effect, McQuillin on Mun. Corp. sec. 1402.) Under section 1 of chapter 145 of the Revised Statutes (Hurd's Stat. 1913, p. 2477,) the legislature has given authority to municipal authorities to vacate streets and alleys by a three-fourths vote, with the added provision that "when property is damaged by the vacation or closing of any street or alley, the same shall be ascertained and paid as provided by law." The record shows that the vacation ordinance here in question was passed by more than a three-fourths vote of the members of the city council of said city of Highland Park, and no point is made

that all of the statutory formalities were not complied with. The legislature has also in the City and Village act (art. 5, sec. 1, par. 7,) granted specific power to municipalities to lay out, establish, open, alter, widen or vacate streets and alleys. In *Parker v. Catholic Bishop*, 146 Ill. 158, this court, in discussing a question similar to the one here involved, said (p. 165): "The municipality holds the streets and alleys of the city in trust for the general public, and by the statute is given power to vacate the same whenever the public interest or convenience, in the exercise of a reasonable discretion, shall seem to such authority to require it."

The city authorities, in establishing or regulating streets and alleys within the municipality, may take any action not incompatible with the end for which streets and alleys are established, and when exercising such discretionary power in regard to them, a court of equity has no jurisdiction to interfere unless the power or discretion is manifestly being abused to the oppression of citizens,—that is, is being unreasonably exercised. (*City of Mt. Carmel v. Sharv*, 155 Ill. 37.) It is a question for the court to decide whether any ordinance is unreasonable. (*Murphy v. Chicago, Rock Island and Pacific Railway Co.* 247 Ill. 614.) The power to vacate a street or alley is to be exercised in the public interest and not for the sole purpose of benefiting private parties. The validity of the proceedings, however, will not be affected by the fact that the land embraced within the street or alley vacated thereby reverts to the adjoining owners or the dedicator and becomes private property. (*People v. Wieboldt*, 233 Ill. 572, and cases cited.) "Nor does it seem material that the vacation is made with the view or intention of vesting the adjoining proprietors with the ownership of the land embraced within the street. That merely goes to the motive by which the act of vacation is performed, and in that, as in all legislative acts, the motives by which the legislative body is actuated are immaterial and

cannot be inquired into." (*Meyer v. Village of Teutopolis*, 131 Ill. 552; Cooley's Const. Lim.—5th ed.—p. 222.) Parol evidence is not admissible to show that a vacation ordinance was passed for private benefit or was otherwise invalid. (*City of Amboy v. Illinois Central Railroad Co.* 236 Ill. 236, and cited cases; 1 Lewis on Eminent Domain,—3d ed.—sec. 209.) The well known author just cited has stated that "the power to vacate and close public streets is as necessary for the public good as the power to establish them, in order that the public may be relieved of the expense of maintaining useless streets and highways and from liability for their non-repair or defective condition, and in order also that, though the ways are not useless, the space occupied by them may be devoted to more pressing public needs or that improvements for the public safety and welfare may be carried out." (1 Lewis on Eminent Domain,—3d ed.—sec. 196.) The motives which may induce municipal authorities to vacate public streets or alleys are usually of a mixed character. Regard for private interests are necessarily interwoven with public interests. (*State v. City of Elizabeth*, 54 N. J. L. 462.) The size of building lots as influencing the readiness of their sale is a proper factor to be taken into consideration in the vacation of streets as well as in the laying out or altering thereof.

Nothing is shown on the face of the proceedings vacating the streets and alleys in question that would in any way indicate that the public authorities were actuated by improper motives or were acting solely on behalf of private interests, as contended by counsel for appellants. On the contrary, the vacation ordinance, among other things, stated that the streets and alleys were vacated and closed "inasmuch as the same are no longer required by the general public as streets and alleys and the public interest will be subserved by such vacation." Even if the parol evidence were admissible, we find nothing in this entire record to

indicate that the city council was not exercising an honest judgment, believing that the public interests would be subserved by such vacation ordinance, even though incidental benefits were received by appellees.

Counsel for appellants cite and rely strongly, among other cases, upon *Ligare v. City of Chicago*, 139 Ill. 46. Bearing in mind the reasoning of this court in *Ligare v. Chicago, Madison and Northern Railroad Co.* 166 Ill. 249, and the facts in these and other cases cited and relied on by counsel for appellants, nothing is said in any of them that in any way conflicts with the conclusion we have reached that the vacation ordinance was not void as against public interests.

Counsel for the appellants further insist that the court erred in not protecting by a writ of injunction, as prayed in said bill, the special or private rights of appellants to their easement in the streets and alleys in question. The authorities are not in harmony as to the rights of adjoining property owners in public streets and alleys. (2 Elliott on Roads and Streets,—3d ed.—sec. 1180; 14 Cyc. 1182.) A full conception of such rights and the rights and interests of the public in the streets and alleys of the city "has been slowly evolved from experience. It has been only at a recent period in our legal history that these two distinct rights have, separately and in their relations to each other, come to be understood and defined with precision." (3 Dillon on Mun. Corp. sec. 1123.) By some authorities it is held that property owners whose lands do not abut upon the portion of the street vacated are not entitled to recover damages for such vacation, while in others it is held that any property owner who receives a special injury because of such vacation may recover damages to his property even though not abutting upon the street vacated. (3 McQuillin on Mun. Corp. sec. 1408; 3 Dillon on Mun. Corp.—5th ed.—sec. 1160.) "There is an essential and an inherent difference between the private proprietary rights

of the abutting owner and the rights of the public as represented by the municipality. The municipal authorities cannot transfer rights which the municipality does not possess, and the easement of access is a private right entirely distinct from that of the public. As the easement of access is a private right, it remains in the owner and does not pass under a grant of the right of occupancy made by the municipal corporation." (2 Elliott on Roads and Streets, —3d ed.—sec. 891.)

Counsel in their brief have cited numerous authorities from other jurisdictions bearing on this question. As there is a conflict in these authorities it will serve no useful purpose to attempt to discuss or review them. This court has heretofore been called upon to consider the principles of law here under consideration. A reference to such decisions will indicate that they are in harmony with the weight of authority in other jurisdictions.

Perhaps the leading authority in this State on this question is *City of Chicago v. Union Building Ass'n*, 102 Ill. 379. It was there said that the rule was well settled that as to any obstruction to the streets not resulting in special injury to the individual only the public could complain, but where such obstruction not only injured the public but at the same time specially injured the individual, the latter could maintain an action and recover for his special injury. In considering what was a special injury the court quoted with approval the following (p. 393): "First, for any act obstructing a public and common right no private action will lie for damages of the same kind as those sustained by the general public although in a much greater degree than any other person; second, an action will lie for peculiar damages of a different kind though even in the smallest degree; third, the damages, if really peculiar, need not always be direct and immediate, like the loss of a horse, but may be as remote and consequential as in other cases of tort; fourth, the fact that many others sustain an injury



of exactly like kind is not a bar to individual actions of many cases of a public nuisance." Again, on page 397, the court said: "Property holders bordering upon streets have, as an incident to their ownership of such property, a right of access by way of the streets which cannot be taken away or materially impaired by the city without incurring legal liability to the extent of the damages thereby occasioned, and to this extent, perhaps, it may be said there is a special trust in favor of adjoining property holders. But in no other respect do the property owners or citizens of the municipality have a right in the street other or different than that of the public generally."

In *Saunders v. City of Chicago*, 212 Ill. 206, the court again considered this question and reviewed certain of the authorities, and said (p. 216): "The private rights which are protected by this statute [section 1 of chapter 145] are only such as are other and different from that of other lot owners. [Citing authorities.] If the vacation of a street by a city council closes a street adjacent to the property of a citizen or one that directly affords access thereto or egress therefrom, it is then regarded that the property of such citizen has been damaged for a public use and that he is entitled to be paid therefor. But if his injury is no different or greater than that of the public it is *damnum absque injuria*, the maintenance or vacation of the street being a question which the municipality may, as the representative of the public, determine in view of what is regarded to be the general interest of the public."

It is sometimes stated that the test is not whether the property abuts but whether there is a special injury, and it is ordinarily held that the private right of access is the right not only to go from one's property to the street and from the street to the property, but also to use the street in either direction as an outlet; that this right extends at least to the next intersecting street. (1 Lewis on Eminent Domain,—3d ed.—sec. 191; 3 Dillon on Mun. Corp.—

sec. 1160; 2 Elliott on Roads and Streets,—3d ed.—sec. 1181.) In an early leading case in Massachusetts it was held that there could be no recovery if the property owner was not specially injured, and the property owner could not recover if his access was cut off only in one direction. *Smith v. Boston*, 7 Cush. 254.

In the recent case of *Illinois Malleable Iron Co. v. Park Comrs.* 263 Ill. 446, this court re-affirmed the rule heretofore stated, that the owners of property bordering upon a street have a right of access to the street which cannot be taken away or materially impaired without compensation, and held that the weight of authority supported the doctrine that owners of land abutting upon neighboring streets, or upon other streets or other parts of the same street, at least beyond the next cross-street, were not entitled to damages notwithstanding the value of their lands might be lessened by the vacation or discontinuance of the street, and said (p. 452): "The inconvenience sustained by him in going from the street in front of his premises to a particular part of the city on account of the closing of the street differed in degree, only, and not in kind, from that sustained by all other persons having occasion to go that way." This court, however, does not hold, as have some authorities, that the property must be immediately abutting in order that the property owner sustain peculiar damages, as in *City of Chicago v. Burcky*, 158 Ill. 103, it was held that the vacation of a part of a street constituting a thoroughfare across railroad tracks and the erection of a viaduct in another place caused a special damage to the land owner, whose property was thereby left upon a blind court, in a manner different from the general public, and entitled him to damages although his property only touched the vacated portion at one corner.

The cases already referred to cite and construe all the leading authorities in this State on this question. We deem it unnecessary to further lengthen this opinion by referring

specifically to many other cases cited in the briefs on this special point. Beyond question, under these authorities, if the appellants' property has incurred a special and peculiar damage of a different kind from that of the general public, it is clear that they are entitled to recover therefor. It seems quite clear, also, that under the authorities in this State appellants cannot recover damages for the vacation of any of the streets or alleys in any part of said Hitch's Fairview subdivision unless as to the vacated alleys in the block in which appellants' property is located. The fact that appellant Hill was responsible for vacating a part of the alley between his own lots prior to the vacation now in question might have some bearing in considering the amount of damage, if any, done to his lots by this vacation.

If it be assumed that the evidence shows that appellants were damaged by the vacation of the alleys immediately abutting upon their property, are they entitled to injunctive relief in this case? The authorities are generally to the effect that where there is an adequate remedy at law and the proceedings to vacate the street or alley have been regular, injunction will not lie. "When the proceedings to vacate are void for want of statutory authority \* \* \* or for any other reason, equity will enjoin the closure or obstruction of the street at the suit of one who would be specially damaged thereby. If the act provides for compensation and the proceedings are regular, injunction will not lie." 1 Lewis on Eminent Domain, sec. 212. See, also, to the same effect, 3 McQuillin on Mun. Corp. sec. 1413, and 2 Elliott on Roads and Streets, (3d ed.) sec. 1194.

Counsel for appellants insist that no case has ever arisen in this State bearing directly on the question of injunctive relief to property owners abutting upon a vacated street or alley. It is true that in none of the authorities cited by counsel on either side in their exhaustive briefs was this question raised by a property owner so situated, but the general principles involved as to whether a person is en-

titled to injunctive relief have been discussed in various decisions in this State. In *Meyer v. Village of Teutopolis, supra*, a street in that village had been regularly vacated by ordinance, and the court stated that if any private rights had been injuriously affected by such vacation common justice would dictate that compensation should be made to the parties injured, but that such right was fully protected by the provisions of chapter 145 of the Revised Statutes.

In *Parker v. Catholic Bishop, supra*, the court discussed at length the principles here under consideration, stating that while the vacation of the alley might deprive the complainant in that case of a valuable property right which she would otherwise enjoy as appurtenant to her land, yet if said alley were vacated for public use and her property be thus damaged she would be entitled to compensation, and the opinion continued (p. 165): "It seems to be well settled in this State that where no part of the land or property of the complaining owner is physically taken for or in making the proposed public improvement, and the damages claimed to result are therefore consequential, only, this provision of the constitution does not require the ascertainment and payment of such damages as a condition precedent to the exercise of the right or power. [Citing authorities.] It seems to be sufficient to answer the constitutional requirement that a remedy is provided for the recovery of such damages." In answer to the argument that the city council, under said chapter 145 of the Revised Statutes, should have ascertained and paid the damages resulting from the vacation as a condition precedent to such vacation, it was held that the discretion was vested in the municipal authorities to decide first whether the property would be damaged by the proposed vacation; that if, in the exercise of a reasonable discretion, it was found to be damaged they could ascertain the damages under said chapter 145, but if they determined that no injury would inure to the property by the proposed action, the municipal authorities, in their

discretion, could pass an ordinance to vacate or close the street or alley; that any other construction of the statute would require the summoning into court of every person whose property may be injured by the proposed vacation; that the presumption was that the city council would discharge its duties as required by law and ascertain and pay damages for any proposed vacation; that (p. 167) "this presumption will obtain until the property owner has in an appropriate action established his right to damages, and the property owner will, where no proceedings have been instituted by the municipality to ascertain his damages, be remitted to his remedy at law for recovery of the same. The determination of the city authorities cannot, however, be conclusive upon the property owner. He will be entitled to his day in court, to recover, in an appropriate action at law, all such special damages to his property, as contradistinguished from damages he suffers in common with the public, as will be occasioned by the proposed vacation."

The rule as thus laid down has been repeatedly sanctioned by this court. In *County of Mercer v. Wolff*, 237 Ill. 74, the court said (p. 76): "But when no part of the land of an abutting owner is taken, the constitution does not require the ascertainment and payment of his consequential damages before entry can be made upon adjoining property. Damages resulting to an abutting proprietor, no part of whose land is physically taken, are not within the contemplation of the Eminent Domain act but he is remitted to his action at law for his damages,"—citing *Parker v. Catholic Bishop*, *supra*, and other cases. In *Murphy v. Chicago, Rock Island and Pacific Railway Co.* 247 Ill. 614, where streets and alleys had been vacated by the public authorities of Joliet in order to require certain railroad tracks to be elevated, and the evidence tended to show that the complainants would be greatly inconvenienced in access to their property and their business thereby damaged and property greatly depreciated, the court said (p. 618): "These

circumstances, alone, do not even tend to show that the ordinance is unreasonable. Such consequences not infrequently result to some property from the elevation of railroad tracks, the building of viaducts and the making of other public improvements, but the improvements are not to be suspended on that account at the instance of the owner of the property affected. If damages result of such a character that he is entitled to compensation he may recover such damages, but he cannot call upon a court of equity to stop the improvement." In *People v. Wieboldt, supra*, the court reached the same conclusion as to the power of the municipal authorities to vacate a street or alley. In *Lewis on Eminent Domain*, (3d ed.) sec. 212, note 73; 2 *Elliott on Roads and Streets*, (3d ed.) sec. 1194, note 101; 3 *McQuillin on Mun. Corp.* sec. 1413, note 91; and 3 *Dillon on Mun. Corp.* (5th ed.) sec. 1160, p. 1844, note 1, all of these learned authors have construed the rule laid down in *Parker v. Catholic Bishop, supra*, and like decisions, as denying in this State the right to relief by injunction for such damages as are here alleged to have been incurred by appellants, because there was an adequate remedy at law under said chapter 145 of the Revised Statutes.

Obviously, under all decisions in this State, property may be so specially and peculiarly injured, even though not immediately abutting upon the vacated street or alley, that damages can be recovered from the municipality for such vacation, and the damage to injured property so situated would differ in degree, and not in kind, from the damages incurred by property immediately abutting upon such vacated street or alley. It would be most illogical to hold that the property owner would be entitled to injunctive relief for indirect or consequential damages, when none of his property had been taken, because his property immediately abutted upon the street or alley vacated, while another property owner who was also especially or peculiarly injured by having access to his property cut off

by the closing of said street or alley would not be entitled to injunctive relief but must be remitted to his remedy at law to recover such damages. This court has never laid down any such rule.

Many cases have been cited by counsel for appellants in which they argue that in circumstances such as these, the owners were held entitled to relief by injunction. In most, if not all, of them no attempt was made by the public authorities to vacate a street or alley or other public property. In many of them there was an attempt to obstruct public property, such as a street or alley, or divert it to an improper use. Thus, in the case of *Newell v. Sass*, 142 Ill. 104, there was an attempt by an abutting property owner to obstruct and close an alley. The same was true in *Smith v. Young*, 160 Ill. 163, and in *Feitler v. Dobbins*, 263 id. 78. In *Village of Princeville v. Auten*, 77 Ill. 325, there was no question of vacation, but a bill was filed to enjoin the village from putting up a building on land which had been dedicated as a public square. Substantially the same was true in *Village of Riverside v. MacLain*, 210 Ill. 308, *City of Chicago v. Ward*, 169 id. 392, and *South Park Comrs. v. Ward & Co.* 248 id. 299. In several other cases cited by counsel for the appellants, parties who had platted property under the provisions of chapter 109, (Hurd's Stat. 1913, p. 1854,) after having sold and conveyed certain lots under said plat, were attempting under that statute to vacate the plat. This court has repeatedly held that this could not be done to the injury of any person who had purchased from the original dedicator or his grantees, but in those cases there was no attempt by the public authorities to vacate the streets or alleys. Among this class of cases are *Earll v. City of Chicago*, 136 Ill. 277, *Corning & Co. v. Woolner*, 206 id. 190, and *Stevenson v. Lewis*, 244 id. 147. The distinction between such cases and the class to which the one here under consideration belongs is clearly pointed out by this court in *Saunders v. City of Chicago*,

*supra*, where it was said (p. 217): "The municipality represents the citizen so far as his general interests are concerned and acts for and binds him, and he must submit to what is deemed the most beneficial to the general public. But this principle is not involved in the construction of the statute relating to the vacation of the streets of a city or village by the proprietor of a plat. He is acting in his individual right, and not as the representative of the owners of lots whose interests are to be affected by his acts." Under said chapter 109 this court has more than once held that all or part of a plat may be vacated provided such vacation will not abridge or destroy the rights or privileges of other proprietors therein, but that such vacation could only be made by the joint action of the proprietor and all the owners of lots in the plat that would be affected thereby. *Saunders v. City of Chicago*, *supra*; *Village of Lee v. Harris*, 206 Ill. 428; *Heppes Co. v. City of Chicago*, 260 id. 506; *Moore v. City of Chicago*, 261 id. 56.

- For the reason that this vacation ordinance was legally passed and was authorized under the statute and that the remedy under said statute by an action for damages is adequate, the court rightly refused the relief prayed for in the bill and dismissed it for want of equity.

The rights that the appellants had, under their deed, in these streets and alleys before they were vacated were the rights of access. It would have been different if the streets and alleys had been laid out under a common law and not a statutory dedication. The difference between a statutory and common law dedication is, that the one vests the legal title to the ground set apart for public purposes in the municipal corporation in trust for the public, while the other leaves the legal title in the original owner, charged, however, with the same rights and interests in the public which it would have if the fee were in the corporation. (*Chicago, Rock Island and Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25; *St. John v. Quitsow*, 72 id. 334.) Where the



law vests the fee of a street in the city, as under a statutory plat, if vacated by the public authorities said fee reverts to the dedicator, his heirs or assigns. It does not pass to the abutting lot owner or his grantees. Neither the State legislature nor the city can divest him of such title. (*Gebhardt v. Reeves*, 75 Ill. 301; *Helm v. Webster*, 85 id. 116; *Village of Hyde Park v. Borden*, 94 id. 26.) But a common law dedication of a street or alley vests in the city the title, only, of an easement, and when the easement is abandoned, the title, with all its incidents, becomes perfect in the adjacent lot owner or owners. (*Sullivan v. Atchison, Topeka and Santa Fe Railway Co.* 251 Ill. 108.) Appellants took their rights in the streets and alleys under a statutory dedication, and therefore, when the alleys were legally vacated, the title to the land composing them reverted to the dedicator's grantee and not to the abutting property owners.

Even if it were assumed that this case belonged to that class of cases where injunctive relief is proper, there is another reason why such relief should not be allowed. In cases where mandatory injunctions are asked for, "it is the duty of the court to consider the inconvenience and damage that will result to the defendant as well as the benefit to accrue to the complainant by the granting of the writ, and where the defendant's damages and injuries will be greater by granting the writ than will be the complainant's benefit by granting the writ, or greater than will be complainant's damages by the refusal of it, the court will, in the exercise of a sound discretion, refuse the writ." (*Lloyd v. Catlin Coal Co.* 210 Ill. 460; *Dunn v. Youmans*, 224 id. 34; 1 High on Injunctions,—4th ed.—sec. 2, and cases cited.) It is not every case of a permanent obstruction in the use of an easement that entitles the aggrieved party to a restoration of the former situation. Each case depends on its own circumstances. The courts, in the exercise of a sound discretion, must determine in such instances whether

a mandatory injunction shall issue. (*Starkie v. Richmond*, 155 Mass. 188.) The facts, as shown on this record, bring this case clearly within the reasoning of these authorities.

Whether, as earnestly contended by counsel for appellees, the appellants are estopped from having any relief in equity by their *laches* we do not find it necessary to decide.

For the reasons already stated, the decree of the circuit court must be affirmed.

*Decree affirmed.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
*vs.* WILLIAM MAY *et al.* Plaintiffs in Error.

*Opinion filed October 27, 1915.*

1. CRIMINAL LAW—*meaning of section 6 of the act relating to venue.* The requirement of section 6 of the act relating to venue that no application for a change of venue made after the first term shall be allowed unless the party applying for it shall have given the opposite party ten days' notice, except where the cause for change has become known within less time, means after the first term at which the defendant had opportunity to file his application for a change, and not the term at which he is arraigned and called upon to plead.

2. SAME—*when application for a change of venue should show why not presented sooner.* An application for a change of venue not made until the defendant is called upon to plead and go to trial, although the term of court began ten days before that time, is fatally defective if it does not show any reason why it was not presented sooner.

3. APPEALS AND ERRORS—*improper conduct of court officers not error if not prejudicial.* Improper questions asked of a witness by the prosecuting attorney and answered over objections, which were sustained, will not amount to reversible error if not prejudicial to the defendant.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. LOCKWOOD HONORE, Judge, presiding.

ROBERT E. CANTWELL, and CHARLES P. R. MACAULAY,  
for plaintiffs in error.

P. J. LUCEY, Attorney General, MACLAY HOYNE, State's Attorney, and GEORGE P. RAMSEY, (J. P. MORAN, of counsel,) for the People.

Mr. CHIEF JUSTICE FARMER delivered the opinion of the court :

Plaintiffs in error were indicted and convicted in the criminal court of Cook county for grand larceny and sentenced to indeterminate terms in the penitentiary. They bring the record to this court by writ of error for review and rely upon two grounds of error for a reversal of the judgment.

The plaintiffs in error were arrested by police officers at Ninety-second street and Commercial avenue, Chicago, soon after alighting from a street car. Upon search of their persons by the police \$400 in currency was found on the person of plaintiff in error Warren, concealed, as the officers testified, between his shirt and drawers. The bills were rolled up and held together by a rubber band, which had been broken and was tied. Ludwig Anderson appeared at the police station very shortly after plaintiffs in error were taken there and complained he had been robbed of \$400 on a street car by two men. He described the money, the amount of it, the denominations of the bills, and their being tied together with a rubber band. He also identified plaintiffs in error as two men he saw on the car, one of whom obstructed his passage and the other jostled him from the rear. Plaintiffs in error claimed the money belonged to Warren; that he was on his way to Hammond, Indiana, to pay it to a man he owed, and that May was accompanying him. It is unnecessary to set out the evidence, as plaintiffs in error, while denying their guilt, do not claim the evidence was insufficient to support the verdict and judgment.

Upon their arraignment in the criminal court, at the December term, 1914, plaintiffs in error filed a motion and petition for a change of venue, alleging they believed they could

not have a fair and impartial hearing before the presiding judge of the criminal court. The application for change of venue was denied and the parties were placed upon their trial. It is contended the court committed reversible error in denying the application for a change of venue.

Plaintiffs in error were indicted by the grand jury of the criminal court at the August term, 1914. A regular term of that court is fixed by statute for each month of the year. There is no record of any proceedings had in the case at the September, October or November term of that court nor until the seventeenth of December. The December term began on the seventh day of December. Upon plaintiffs in error being arraigned and pleading to the indictment they filed their petition for a change of venue. No reason was given in the petition why it was not filed earlier, no notice was given to the State's attorney of an intention to file it, nor was it stated when knowledge of the cause set up and relied upon by plaintiffs in error for a change of venue first came to them. Section 3 of chapter 146 of Hurd's Statutes of 1913, entitled "Venue," requires the petition for a change of venue to set forth the cause of the application and to be verified by the affidavit of the applicant. Section 5 authorizes the application to be made to the court in which the cause is pending, in term time, or to the judge thereof in vacation, upon reasonable notice. Section 6 provides that no application for a change of venue after the first term shall be allowed unless the party applying for it shall have given the opposite party ten days' notice, except where the causes have arisen or come to the applicant's knowledge within less than ten days before making the application. Section 7 provides: "No change of venue shall be granted after the first term of the court at which the party applying might have been heard, unless he shall show that the causes for which the change is asked have arisen or come to his knowledge since the term at which the application might have been made." Here the term at which the indictment was found expired and three

other terms intervened before the application was made, and no reason or excuse was given why it was not made earlier.

Plaintiffs in error contend that the requirement of the sixth section of the statute that the application must be made at the first term, except where the causes for the application have arisen or come to the applicant's knowledge subsequently, means the term at which plaintiffs in error were arraigned and called upon to plead. We do not think the statute susceptible of this construction, and the point has been substantially decided contrary to the plaintiffs in error's contention in *White v. Murtland*, 71 Ill. 250, and *Peoria and Rock Island Railway Co. v. Mitchell*, 74 id. 394.

We are further of opinion that, independently of the fact that a number of terms of court had intervened between the return of the indictment and the term at which the trial was had, plaintiffs in error were required by the statute to give the reasons in their petition why they had delayed making the application for a change of venue until they were called upon to plead and go to trial. Ten days intervened from the first day of the term to the date of the application, and we are of opinion the petition was fatally defective in not showing why it was not sooner presented.

Complaint is also made that the assistant State's attorney who tried the case for the People was guilty of improper conduct during the trial which was prejudicial to plaintiffs in error. This alleged improper conduct consisted of two or three questions asked of the police officers and one of plaintiffs in error, to which the court sustained objections. We are of opinion that the questions were not of a character to prejudice plaintiffs in error despite the rulings of the court. One of the police officers was asked how he happened to grab plaintiff in error May, and over objection answered, "I saw the way they split on the street and I know May." We think there was no error in the ruling of the court in this regard.

The judgment of the criminal court is affirmed.

*Judgment affirmed.*

PETER C. CONRAD *et al.* Defendants in Error, *vs.* SELENA A. BARTO *et al.* Plaintiffs in Error.

*Opinion filed October 27, 1915.*

APPEALS AND ERRORS—*Supreme Court will not consider arguments couched in contemptuous language.* A brief and argument which is couched in contemptuous language and which goes into matters entirely outside the record to find a basis for personal abuse of the trial judge and of opposing counsel will be stricken from the files by the Supreme Court of its own motion.

WRIT OF ERROR to the Superior Court of Cook county;  
the Hon. RICHARD E. BURKE, Judge, presiding.

LEMUEL M. ACKLEY, for plaintiffs in error.

LESLIE H. WHIPP, for defendants in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

In this case one of the plaintiffs in error has appeared as counsel for the plaintiffs in error, and in the brief filed has permitted his criticism of the action of the court to degenerate into personal abuse of the judge who heard the cause as well as the counsel on the other side of the case. In various parts of his brief he has spoken contemptuously of the ability, education, legal knowledge and reputation of the judge and of the character of his practice as a lawyer, going entirely outside the record for this purpose and referring to matters having not the slightest connection with the case. Such an attitude of counsel to the court cannot be tolerated, and the records of this court cannot be used as a vehicle for abuse of the judge or of opposing counsel. Entire freedom of criticism is allowable so far as the rulings of the court are concerned, but the argument must be based on the record, and attacks on the integrity, intelligence or motives of the judge cannot be permitted. It is unnecessary to set out here the statements made in

the brief. Their character has been sufficiently indicated. We shall not consider arguments in any cause which are couched in contemptuous language, disrespectful to the court and to counsel.

The brief and reply brief of the plaintiffs in error will be stricken from the files. The cause will be continued, and the plaintiffs in error will be permitted to file briefs twenty days before the first day of the next term which are free from the defects contained in the briefs now on file. The defendants in error may file briefs under the rule or let the briefs already filed stand, as they may be advised.

*Briefs stricken.*

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CAROLINE ENDERS, Plaintiff in Error, vs. CLARA MUNO  
*et al.* Defendants in Error.

*Opinion filed October 27, 1915.*

1. DEEDS—*when delivery of a deed is not shown.* Where the only two witnesses competent to testify as to the delivery of a deed contradict each other, but the witness testifying to facts showing delivery is the son of the complainant, who is seeking to establish the delivery, whereas the witness testifying to the facts showing non-delivery is disinterested and is not shown to be less worthy of credit than the other witness, a delivery is not established.

2. SAME—*when finding that grantor was competent to make the deed will be upheld.* A finding by the chancellor that the grantor was competent to make the deed in question will be sustained by a court of review where the preponderance of both expert and non-expert testimony is in accordance with such finding, when all the evidence in the case, together with the opportunities of the witnesses for observation and their bias or lack of bias, is considered.

3. WITNESSES—*when co-defendant is competent to testify.* On a bill to set aside a deed, filed by the complainant against her brother and sister, if the interest of the sister is identical with that of the complainant she is a competent witness when called as a witness by her co-defendant.

WRIT OF ERROR to the Circuit Court of Cook county;  
the Hon. JESSE A. BALDWIN, Judge, presiding.

OTTO F. REICH, (I. T. GREENACRE, of counsel,) for plaintiff in error.

VINCENT D. WYMAN, CHARLES E. CARPENTER, and OTTO W. JURGENS, for defendant in error Wm. Schiestel.

Mr. JUSTICE DUNN delivered the opinion of the court:

Caroline Enders filed two bills on the same day against William Schiestel, one of which sought an accounting for two notes amounting to \$2400, one secured by a mortgage on land in Michigan, the other by a mortgage on land in Cook county, Illinois, and for the profits from the use of 40 acres of land on Lincoln and Devon avenues, in the city of Chicago. The second bill sought to set aside a warranty deed from Joseph Schiestel to William Schiestel, dated January 24, 1912, and for partition of the premises. Clara Munro was also made a defendant to both bills, and Amatha Schiestel (William Schiestel's wife) was joined as a defendant in the second bill. Answers were filed, the causes were referred to a master and consolidated, were heard upon the master's report and exceptions thereto, and a decree was rendered dismissing the bills, to reverse which the complainant has sued out this writ of error.

Clara Munro, Caroline Enders and William Schiestel were the only children of Joseph Schiestel, who died March 31, 1912. In his lifetime he owned two tracts of land in the city of Chicago,—one of 29½ acres, the other (which was his homestead) of 30.55 acres,—and two vacant lots. He had inherited the homestead from his father and cultivated it as a truck farm, together with the 29½ acres. William lived with his father on the land and gave his whole time to helping cultivate it until he was thirty-five years old, without compensation, except that during the last seven years of that time he had all the income of the 29½ acres for the taxes. Five or six years before his father's death William married, and after that event he lived upon and cul-



tivated the land, paid the taxes and received the income by agreement with his father, who lived with him and worked on the place as he had formerly done, receiving for his work nothing but his board and lodging. Besides the land Joseph owned about \$23,000 in notes, mostly secured by mortgages. In the latter part of July, 1911, Joseph suffered a slight paralytic stroke and was soon afterward removed to the home of his daughter Caroline Enders, who was a practical nurse, where he gradually improved. He had a serious illness in September, from which he had practically recovered when in the latter part of November he suffered a second paralytic stroke, after which he was confined to his bed or to a reclining chair until his death. Believing that he would not recover and desiring to dispose of his property in his lifetime and to save the expense of administration upon his estate he sent for Henry P. Kransz, who had for a long time attended to his investments, to attend to this matter also. Kransz came on December 19 to Mrs. Enders' home, and a deed was then signed and acknowledged by Joseph Schiestel in the presence of Mr. and Mrs. Enders, their son, Joseph, who signed the deed as a witness, Kransz and William Schiestel, conveying all the real estate of Joseph Schiestel to all three of his children, equally. When the deed was presented to Joseph Schiestel, Kransz said to him that it was a deed of all the property, jointly, and the children might make a settlement among themselves, if that was his intention. Joseph answered that it was not exactly what he wanted, but if Kransz thought that was best, let it go. He then signed the deed by his mark, acknowledged it and handed it to William, telling him to put it with Joseph's papers. This is according to the testimony of Kransz. Joseph Enders, on the other hand, testified that his grandfather expressed no dissatisfaction with the deed but simply signed it and gave it to William. At the same time the two mortgages and notes in controversy were assigned and delivered to William, for the reason that he and his father were jointly interested in them

and the father had received his share. This disposition of his property was not satisfactory to Joseph, who had intended for many years that upon his death his son should have the homestead, which had been in the family for sixty years, and about a month later he again sent for Kransz, who came on January 24, 1912, in response to his request. Joseph told Kransz that the deed he had signed was not what he wanted; that he wanted it divided; that he did not want the children to have any trouble when he was gone or any argument about it. He rejected the suggestion of a will, saying that he did not like lawyers and courts and did not think he needed a will. The deed was thereupon torn up and two deeds were then executed, the one to William being the deed in controversy here, for the homestead, and the other to the daughters, Mrs. Enders and Mrs. Munro, for the rest of the real estate. The same persons were present as on the occasion of the signing of the former deed. Joseph Enders and Kransz signed the deeds, which were executed by mark, as witnesses. William's deed was delivered to him and the other to Mrs. Enders. Joseph had sold 10½ acres off the 40-acre tract of which the 29½ acres had been a part, to the Sanitary District of Chicago for \$10,000, and he stated that he wanted William to have the homestead and his daughters to have the other farm off which he had sold the 10 acres, and the money that he got from the sanitary district he wanted them to have instead of the 10 acres. All of his estate except \$9000, which the daughters were to have, he wanted divided equally among the children of their own will, and he hoped that they would not get into any controversy about it or any lawsuit. To make up the remainder of the \$10,000 William was to give his note for \$1000, payable equally to his two sisters after his father's death. Accordingly William gave his note for \$1000, and it was paid, after his father's death, to Mrs. Enders and Mrs. Munro. At the same time that he made this disposition of his property Joseph made a settlement with Mrs.

Enders for his board and nursing, paid her and took a receipt for such payment. The deed to William was recorded on March 28, 1912, three days before the grantor's death, and that to Mrs. Enders and Mrs. Munro a few days after his death, at the instance of Mrs. Munro. Mrs. Enders was appointed administratrix of the estate, which she has settled.

The plaintiff in error contends that the evidence shows that Joseph Schiestel never recovered from the stroke of paralysis which he suffered in July, 1911, and that he was mentally incompetent to execute a deed on December 19, 1911, and on January 24, 1912, but that if he was competent on December 19, the deed made then effectually disposed of his real estate and left nothing which he could convey on January 24. Whether he was competent on December 19 is only material as bearing on the question of his competency on January 24, for the deed of December 19 is not shown to have been delivered. The testimony of the only two competent witnesses present when it was signed does not agree. Kransz, who wrote it, testified that the grantor, while expressing dissatisfaction with it, signed it and handed it to his son, one of the grantees, and told him to put it with the grantor's papers. While this is not conclusive that it was not delivered, it tends to prove that the grantor retained control of the instrument and did not intend that it should then take effect as a present conveyance. Joseph Enders, on the other hand, testified that after the deed was signed Kransz said to the grantor that he had better give it to someone, and suggested William Schiestel, and William took the deed and Kransz said he would have it recorded. This tends to prove a delivery of the deed, but no delivery was shown, for if what one witness testified took place there was a delivery, while if what the other testified took place there was none. If the witnesses were entitled to equal credit a delivery was not shown, but it is not to be overlooked that Kransz has no interest of any kind in the suit, while Enders is the son

of the plaintiff in error, desirous of having her win her suit and doing all he can to assist her.

In regard to the mental condition of Joseph Schiestel on January 24, 1912, there is the conflict in the evidence usually found in cases of this kind. Aside from the medical witnesses, the principal testimony to facts showing unsoundness of mind comes from the son, two daughters and two sons-in-law of the plaintiff in error, the chief of whom is Joseph Enders, the son, who was at his mother's house during all the time his grandfather was there previous to his death. His testimony is very full and emphatic but is in parts exaggerated, contradictory and inconsistent with itself and the other evidence in the case. While the opportunities of these witnesses for observing the actions of Joseph Schiestel and forming conclusions as to his mental condition were favorable, their bias and natural interest in the case of the plaintiff in error tend to make their testimony less convincing than that of witnesses not affected by such bias and interest. The three or four other witnesses who expressed an opinion unfavorable to the mental capacity of Schiestel testified to occasions of weakness or confusion which indicated physical and mental weakness but not necessarily want of understanding. After the stroke of paralysis he had some difficulty in speaking. He had a habit of talking to himself and did not talk much to other people. He was hard of hearing and his eyesight was bad, and these circumstances explain his inability, in many instances, to recognize people, to understand what was said to him and to carry on conversation. A dozen or more witnesses, most of whom were old acquaintances, testified to visiting and talking with him, describe his apparent mental and physical condition, give his conversation, and state their opinion that he was of sound mind and capable of transacting business. Mrs. Munro, his daughter, was with him the day before the deeds were executed, together with Mrs. Enders and William. Her father had sent for her because he said he wanted to

get things straightened up. He told them what disposition he proposed to make of his property and asked them if they were satisfied. Mrs. Munro and Lorenz Schiestel (Joseph's brother, who was also present,) testified that he was of sound mind and his mind was clear. Henry P. Kransz, who wrote the deeds and was present with Mrs. Enders and William the next day, testified that he was of sound mind. The great preponderance of the non-expert testimony was in favor of Schiestel's soundness of mind. So also was the preponderance of the medical testimony. The attending physician testified strongly that Schiestel was not competent to transact business after his second stroke of paralysis, but the inconsistencies in his testimony deprive it of a great deal of its weight. Three other physicians who had no acquaintance with Schiestel and had never seen him, testified as experts, and, though there was disagreement in their testimony, when their answers to hypothetical questions are considered in connection with the facts shown by the evidence, they sustain the theory that the paralysis was not such as necessarily affected the soundness of mind of the sufferer and that his mental condition was not inconsistent with a capacity for the transaction of business.

William Schiestel had devoted many years of his life to his father's service; his sisters had married and left home early in life, many years before their father's death; his father had long cherished the intention of leaving the homestead to his only son, and the disposition made of his property was upon an equitable plan which accorded with his sense of fairness to his children. The evidence would not justify a court in setting the deed aside.

Objection is made to the competency of Mrs. Munro as a witness. She was made a defendant to the bill with her brother, William, and was called as a witness by him. Her interest was identical with that of Mrs. Enders, and she was therefore competent when called by the adverse party. *Duffy v. Duffy*, 243 Ill. 476. *Decree affirmed.*

GEORGE HOLLIDAY *et al.* Appellees, *vs.* REASON SHEPHERD  
*et al.* Appellants.

*Opinion filed October 27, 1915.*

1. WILLS—*when record showing appointment of conservator is admissible.* As bearing on the issue of mental capacity in a will contest case, where the evidence shows the testator had always been weak-minded, the record of the county court showing the appointment of a conservator for the testator about a month before the will was made, upon the verdict of a jury finding him insane, is admissible, not as conclusive of the question of insanity, but to be considered with the other evidence. (*Entwistle v. Meikle*, 180 Ill. 9, and *In re Weedman's Estate*, 254 id. 504, distinguished.)

2. SAME—*when declaration by testator after execution of will is admissible.* Testimony by one of the witnesses to the will in contest that one reason why he thought the testator, who was a weak-minded man, did not understand what he was about when he made the will, was that the testator, a few days after the will was made, stated to him that he had disposed of his property by the will in a certain way detailed by him which was not in accordance with the will, is admissible as bearing upon the question of testamentary capacity.

3. APPEALS AND ERRORS—*what questions will not be considered on appeal.* Questions which are raised in the reply brief for the first time will not be considered by the Supreme Court, nor will errors which are assigned but not argued.

APPEAL from the Circuit Court of Vermilion county;  
the Hon. E. R. E. KIMBROUGH, Judge, presiding.

O. M. JONES, GEORGE R. TILTON, and CHARLES G. TAYLOR, (WILLIAM R. LAWRENCE, of counsel,) for appellants.

W. B. WILSON, JOSEPH A. JENKINS, KEESLAR & GUNN, and ACTON & ACTON, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Vermilion county setting aside the will of Jason H. McKinney, deceased. The bill alleged that the instrument in question was not signed by the deceased, that he was not

of sound mind and memory at the time of its execution, and that such execution was obtained by fraud and undue influence of certain of the beneficiaries. On a trial of the issues raised by the pleadings the verdict of the jury stated that the writing in question was not the last will and testament of the deceased, and the decree was entered accordingly.

Jason H. McKinney died March 20, 1912, leaving as his only heirs a half-brother, Albert McKinney, one of the appellees herein, and Malinda Nichols, a half-sister, to each of whom he left \$500, and George Holliday and Mary Stenger, children of a deceased sister. All of his property except the said two \$500 legacies, consisting mainly of an eighty-acre farm, was divided by the will equally between Reason Shepherd, a cousin, and Josephine Lawrence, a distant relative, who was the wife of the attorney who drew the will. The instrument was executed on May 6, 1893. McKinney had lived all his life in Vermilion county. There is no positive testimony in the record as to his age, but we gather from what was stated that he was nearly seventy years old at the time of his death.

The principal question urged by appellants is that the evidence does not sustain the verdict and decree. From the testimony there is little question that McKinney was not well developed mentally. Some of the witnesses testified that he was feeble-minded, and one or two stated they would consider him an idiot or an imbecile. The great weight of the testimony of all the witnesses is to the effect that he was weak mentally. Testimony of more than sixty witnesses was heard by the jury,—about twenty-five for appellants and about forty for appellees. Four doctors, a number of business men, farmers and others who knew the deceased at the time of the making of the will and previous thereto, testified for the appellants. About twenty of them testified they believed he knew his friends, what property he had and to whom he wished it to go,

Many of them admitted he was of weak mental capacity, using different language, as, "not bright," "not normal," "peculiar," "had an undeveloped mind," "was like a child," was considered "a joke" by those who knew him. Practically all the witnesses for appellees, many of whom had been intimately acquainted with him a long time, after stating the facts upon which they based their testimony, gave the opinion that he was not of sound mind, some saying he did not have sufficient mind to reason intelligently on any subject. Many witnesses stated that he was better at some times than at others. For years before he executed this will he lived on the farm in question with his mother. She died shortly before the will was executed. The great weight of the testimony is to the effect that when living with his mother she took charge of the farm, and while he helped her, went on errands and did small jobs, he rarely acted independently of her directions. While some of the witnesses for appellants say he was a good judge of stock and talked about horses and trading a good deal, no one ever took such talk seriously. He did little trading of any kind. The most he ever bought at the store was candy, tobacco, or something of like character. The testimony, we think, is uncontradicted that he often talked of getting married the same as he talked of making trades, buying and selling live stock, there being no real foundation for talk of this kind. Some of the witnesses stated that he was easily excited, would talk of doing certain things, but that no one ever took him seriously in regard to any of these matters. A tenant of his mother testified that McKinney would frequently call people his friends and other persons his enemies, when, as a matter of fact, the one he would call an enemy was a friend and the one he called a friend was not friendly to him. One witness testified he had given testator a dollar bill and the latter thought it was a ten-dollar bill. The testimony is also to the effect that he was a great eater and never knew when to quit,



eating so much that he would sometimes make himself sick; that when others had finished he would go to the table and eat from the various plates; that he would go to the cellar and open cans of fruit and eat therefrom and drink from the crocks of milk.

In April, 1893, after his mother's death, on the petition of his half-brother, one of the appellees herein, a conservator was appointed to take charge of McKinney's property, which at that time, according to the petition, consisted of about ninety acres of land and about \$4000 of personal property. This appointment was made the month preceding the execution of the will. The conservator was appointed and apparently acted for some time, and was followed by a successor, but there is no proof in the record as to whether a conservator had charge of his property up to the time of his death. One of the persons who had acted as conservator testified for appellants that McKinney had sufficient mental capacity to understand what property he had and how he wished to dispose of it.

The will was drafted and executed in Danville, in the law office of attorney Lawrence, the husband of one of the beneficiaries. One of the attesting witnesses was called on at his store by Reason Shepherd and asked to act as such. This witness, M. S. Plaut, swore that he thought McKinney was of sound mind and memory at the time. The other witness, C. E. Jones, a near neighbor of the testator, testified that he was asked by McKinney to go to Danville to act as a witness. His testimony at the time the will was presented for probate was of such a nature the probate was allowed. On the trial in this case he testified that he did not think that the testator, judged by what he told witness afterwards, understood, at the time the will was executed, what he was about. It seems he drew this conclusion largely from the fact that the testator told him, a short time after the will was executed, that he did not know much about the will, but said he had left his cousin

Josie \$500 and Reason Shepherd \$500, and "the balance of my property goes to my half-brother and sister." The cousin Josie was Reason Shepherd's wife. The testimony of both attesting witnesses was that there was no discussion of the contents of the will at the time it was executed. Some of the witnesses testified that McKinney had been confined in an asylum for a time, but just how long the record does not show. One of the witnesses testified he had been there about two years. There was no attempt to show whether he was sent to the asylum at the time of the appointment of the conservator herein referred to, or whether there was another trial and finding upon which he was confined in the asylum.

We have not attempted to detail all of the evidence but have given the substance of the most material things bearing on the testator's mental capacity. We can reach no other conclusion than that the great weight of the evidence supports the verdict of the jury and the decree of the court on that question.

Counsel for appellants earnestly contend that the trial court erred in admitting the record of the county court to show that a conservator had been appointed for McKinney in April, 1893, on the ground that the statute under which that trial was held only required proof that he was unable, from any cause, to control, direct or manage his property; that a conservator might have been appointed under that statute because McKinney was a spendthrift. The first section of the statute in force at the time of the appointment of the conservator (Hurd's Stat. 1891, p. 930,) is somewhat similar in wording to the present statute. There was at that time another statute which provided for an inquisition in insanity if the person was to be confined because of mental unsoundness. (Hurd's Stat. 1891, p. 926.) While both of these statutes have been amended or revised since that time, (Hurd's Stat. 1913, pp. 1581, 1588,) they are, so far as they bear on this question, substantially like

the ones then in force. The argument of counsel for appellants on this point is, that by the statute then in force, under which the conservator was appointed, it was only necessary to show that McKinney was incapable, for any reason, of managing and caring for his property, while the issue in the present case was whether he had sufficient mental capacity to make a will. No question is raised here that the record of the appointment of the conservator was not correctly certified to and properly admissible in evidence if it was competent on the issue here involved. Ordinary inquisitions in lunacy are held admissible in evidence as bearing on the question of the mental capacity of the person who was the subject of such inquisition, but such inquisitions or records are not generally conclusive except against the parties immediately concerned and their privies. (1 Greenleaf on Evidence,—16th ed.—sec. 556.) Such a record is generally only *prima facie* evidence as to the sanity or insanity of the person at the time when the adjudication was made. (7 Ency. of Evidence, 477, and cases cited.) It is true, as contended by counsel for appellants, that the proof under the two statutes as to lunatics in force at the time said conservator was appointed might have been different in the case of the mere appointment of a conservator than would be required if the patient was also to be confined in a hospital for the insane, but we do not think that fact would prevent the admission of the records of a proceeding under either statute on a hearing of this character. The general rule is that the admission in evidence of an adjudication of insanity does not depend upon whether it was founded upon an oath or not, but rather upon the public nature of the hearing and the public interests involved. (1 Greenleaf on Evidence,—16th ed.—sec. 556.) The verdict of the jury upon which the appointment of the conservator was based found that McKinney was insane. In view of the history of this man, as shown in this record, from the time of his boyhood, the

record of the county court as to the appointment of a conservator for McKinney in 1893 was admissible, not as conclusive on the question of insanity, but to be considered by the jury for what it was worth. If the proof in this record had shown that the conservator was appointed for the sole reason that McKinney was a spendthrift or a drunkard a different question as to the admissibility of the county court record would be presented. The reasoning of this court in *Bollnow v. Roach*, 210 Ill. 364, on an analogous question, tends to support this conclusion. This court held in *Entwistle v. Meikle*, 180 Ill. 9, that the record of the appointment of a conservator three years after the will was made was too remote to the issue to be admissible. We do not consider that case as in any way conflicting with the conclusions already reached here as to the admissibility of the record in question in this case. The case of *In re Weedman's Estate*, 254 Ill. 504, was a hearing on an application for the probate of a will, and therefore is not in point on the admissibility of this record in this proceeding.

Counsel for appellants further contend that the testimony of the attesting witness Jones as to the conversation concerning the contents of the will, a few days after it was executed, was inadmissible, being, in effect, an attempt to revoke a will by parol evidence. At the time this testimony was offered the court ruled that it was admitted solely on the ground of its bearing on the mental capacity of the testator. The declarations of the testator, made either before or after the execution of an alleged will, as to his testamentary intentions, are competent on the question of his testamentary capacity. (*Hurley v. Caldwell*, 244 Ill. 448; *Kellan v. Kellan*, 258 id. 256.) The admission of this testimony was therefore not error.

Counsel for the appellants further argue that the trial court, contrary to the holding in *Wetzel v. Firebaugh*, 251 Ill. 190, permitted witnesses for appellees to express opinions as to the ultimate facts to be determined by the jury.

This question was raised in this court for the first time in the reply brief of appellants. Under the rules of this court and its long settled practice, questions not raised by appellants in the original brief cannot be raised in the reply brief. A contrary practice would permit appellants to argue questions in their reply briefs as to which counsel for appellees would have no opportunity to reply. This question therefore need not be considered.

Before the jury was empaneled and the issue as to the mental capacity of the testator taken up for a hearing, certain proof was offered by appellees as to the relationship of George Holliday and his co-complainants, and certain testimony of Albert McKinney as to why his sister, Malinda Nichols, did not join with him as a contestant. Counsel for appellants insist that the court erred in admitting any of this testimony, as it was given by parties who under the statute were not competent to testify. Conceding, for the purposes of this argument, that counsel are right, we cannot see how it in any way injuriously affected the issues before the jury as to the testator's mental capacity.

Numerous errors are assigned on the record but few of them have been argued. Errors assigned and not argued are waived. (*Lewis v. King*, 180 Ill. 259; *Sullivan v. Atchison, Topeka and Santa Fe Railway Co.* 262 id. 317.) The questions already considered are the only ones, as we read the briefs, that are argued therein by counsel for appellants.

We find no reversible error in the record. The decree of the circuit court will therefore be affirmed.

*Decree affirmed.*

NATHAN A. STOWELL *et al.* Appellees, *vs.* PATRICK M. LYNCH *et al.* Appellants.

*Opinion filed October 27, 1915.*

1. LIMITATIONS—*what is necessary to establish title under section 1 of the Statute of Limitations.* To establish title under section 1 of the Statute of Limitations there must not only be twenty years' continuous and uninterrupted possession, but such possession must also be hostile in its inception and so continue, being visible, exclusive and notorious, acquired and retained under claim of title inconsistent with that of the true owner.

2. SAME—*when possession is not hostile in its inception.* A wife who goes into possession of her husband's land because of his absence and continues in possession at his death as owner, by descent from him, of an undivided one-half interest in the land with a dower interest in the other half, does not have possession, hostile in its inception, as against heirs-at-law of the husband, who at his death succeeded to an undivided one-half interest in the land.

3. SAME—*possession by one tenant in common must amount to a disseizin to be adverse.* While one tenant in common may obtain title by limitation against his co-tenants, it must be by acts that would amount to a disseizin, and there must be something more than mere possession, appropriation of the rents and profits and payment of taxes by one tenant in common to bar the right of other co-tenants.

4. SAME—*strong evidence necessary to show adverse possession by a co-tenant.* The evidence must be stronger to establish adverse possession against co-tenants than is necessary to establish ordinary adverse possession, and there must be outward acts of exclusive ownership of an unequivocal character, of such a nature as by their own import will give notice to the co-tenants that an actual disseizin is to be asserted against them.

5. SAME—*co-tenants must be given notice in some way in order to start the Statute of Limitations.* Where one claims title by adverse possession and limitation against co-tenants, the co-tenants must be given notice in some way that an adverse possession is being asserted against them in order that the Statute of Limitations may begin to run.

6. LACHES—*equity ordinarily follows the law in barring claims by laches.* In fixing the period in which claims will be barred by laches equity ordinarily follows the law, and it is only when the delay is accompanied by some other element rendering it inequitable to permit the owner to assert his title that laches will be held to bar his right within the statutory limitation period.

7. SAME—*what may be considered on question of laches.* In determining whether heirs have been guilty of *laches* in delaying suit for partition until the co-tenant in possession has made a deed purporting to convey the whole title, the facts that the ancestor is merely presumed, from absence, to be dead, that there were rumors after the seven-year period of his disappearance that he was alive, and that the improvements made by the co-tenant in possession were only such as were necessary and did not equal the rents received by her, may be considered.

8. SAME—*what may be shown as bearing upon the question of laches.* As bearing upon the question of *laches* by heirs in waiting until their co-tenant had conveyed the whole title before beginning suit against the grantee for partition, the facts that the grantee knew of the existence and rights of the heirs, that he knew his grantor had unquestioned title to an undivided one-half interest in the land, and that he paid only about one-half of what the land was worth, may be shown in connection with the other circumstances.

APPEAL from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding.

CAMERON & CAMERON, McCABE & BIRKETT, and FRANK J. QUINN, for appellants.

JOSEPH W. MAPLE, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Appellees, complainants in the court below, filed their bill for partition of a 90-acre farm in Millbrook township, Peoria county, claiming, together with certain of the defendants, to be the owners of an undivided half interest in the said farm as descendants of the brothers and sisters of Millard F. Hull, deceased, and heirs-at-law of the said deceased, and claiming to be co-tenants with Patrick M. Lynch, owner of the other undivided half interest in said farm as grantee of Mary A. Hull, widow of said Millard F. Hull. Hull, as alleged in the bill, had disappeared and was last heard from about the year 1871 and was presumed dead after seven years, and he left no children or descendants of children him surviving.

Patrick M. Lynch and James W. Lynch, the latter as administrator of the estate of Mary A. Hull, deceased, filed their answer, denying that complainants had any interest in the premises; admitting that Millard F. Hull disappeared in 1871 and was presumed to have died about June 8, 1878, and admitting the heirship of the complainants as alleged. It was set up in the answer that the title of Patrick M. Lynch is derived from a warranty deed from his sister, Mary A. Hull, widow of Millard F. Hull; that Mary A. Hull on the death of her husband became seized in fee of an undivided one-half of the premises in question and was entitled to dower in the other half, and that her dower was never set off or assigned to her; that she obtained possession of said premises about the year 1878, and thereafter exercised acts of ownership over said premises until she conveyed the same by deed to her brother Patrick M. Lynch, and that she held and possessed said premises under claim of ownership, through open, adverse, notorious and exclusive possession thereof, paid the taxes thereon more than thirty years consecutively, erected valuable and permanent improvements on the said premises, leased said premises for about thirty-five years, and collected and received the rents in her own right and to her own use; that during all that time no other person or persons ever claimed any right, title or interest in said land, and that if any other person or persons ever had any right, title or interest therein, by descent or otherwise, the same is now, and has long since been, barred by the Statute of Limitations of this State, and defendants claim the benefits of such statute.

Issue was joined on the bill and answer and the cause was referred to the master in chancery to take the evidence and report his conclusions. It appears from the evidence as reported by the master, that Millard F. Hull was in his lifetime the owner in fee simple of the premises in controversy. Neither he nor his wife, Mary A. Hull, ever at



any time resided upon the land. About the year 1869 Hull left the State of Illinois and went to DesMoines, Iowa, to live and lived there about a year, when he left there to seek a new location. After he left DesMoines, his wife, not hearing from him for some time, returned to Peoria county and made her home with her brother James Lynch, who lived near the land, until she died. About June 8, 1871, she received a letter from Hull, in which he stated that he was then about to go to Missouri or Arkansas to look for a location, and that when he found one that suited him he would send for her. This was the last that was ever heard of him by his wife or any of his relatives, although they made search and inquiry to discover whether he was living or dead, and his whereabouts. After a few years it came to be generally accepted among his relatives that Hull was dead. When Mrs. Hull returned to Peoria county, about the year 1870 or 1871, the farm was in charge of Augustus Stowell, brother-in-law of Hull and father of certain appellees. About the year 1873 or 1874 Mrs. Hull demanded possession of said premises. Pursuant to her request and demand, about the year 1873 or 1874 Stowell surrendered possession of the said premises to her. The exact time when she obtained possession is not shown by the evidence, but the witness Katherine Kelly fixes the time when Mrs. Hull went to Peoria to consult a lawyer about getting possession, as in 1873 or 1874, and a year later she had possession of the land. Tax receipts were offered in evidence to show that Mrs. Hull paid the taxes in 1873 and from 1875 on, to and including the year 1911. Her brother James Lynch helped her keep up the farm and negotiated leases and collected rents. Hiram C. Camp, a witness for appellants, testified that he rented the place from James Lynch in 1874, paying \$300 cash rent that year. It sufficiently appears that Mrs. Hull obtained possession of the farm prior to the presumed death of Hull, and continued to hold the open, notorious and exclusive

possession of the same and received and collected all rents and profits therefrom until November 10, 1911, when she conveyed the premises to her brother Patrick M. Lynch by warranty deed of that date. The deed was for the consideration of \$8000, the grantor reserving a lien upon the premises for the payment of \$6500 of said purchase price, together with interest thereon at the rate of five per cent per annum. It recites that said premises are "now owned and possessed by me," and further recites that "this deed and conveyance is made by the grantor in her own right, under the claim that she, as owner of said premises, has held and possessed them under claim of ownership, through open, adverse, notorious and exclusive possession thereof, together with the payment of the taxes thereof for more than thirty-five years last past, and has exercised other acts of ownership over said premises by making permanent and valuable improvements thereon during said period of time." The consideration paid by Lynch was about one-half the then value of the land. Mrs. Hull died intestate, on December 15, 1912. From time to time prior to June, 1878, Mrs. Hull placed certain improvements on the land, among others a hay shed and barn, and also built a dwelling house to take the place of a house that had burned down, and kept the fences upon the premises in repair. All of said improvements were comparatively inexpensive in character and were no greater than was reasonably necessary to secure tenants and a reasonable revenue from said property, and were all paid for by her from her own resources or from rentals received from said property, and she likewise paid all taxes after she took possession of said premises, and at various times took out insurance policies on buildings on the premises payable to her. The farm was commonly known in the neighborhood as the Hull farm, or the Mary Hull farm, and in conversations between her and other persons Mrs. Hull sometimes spoke of it as her farm. The master found, and this finding is not questioned, that

at the time Mrs. Hull first took possession of the premises she made no claim of title thereto or right therein except through her marriage to Millard F. Hull, and at the time of his death she was in possession of the premises through and under and in attornment to his title thereto and not otherwise, and was not making any claim adversely to the title possessed by him at the time of his death; that she first received possession of said premises in express recognition of and in attornment to the title of Hull, and upon his death she then held such possession pursuant to her rights as his widow and one of his heirs-at-law, and could not lawfully claim adversely to the title of the other heirs-at-law of Hull until she at least in some unequivocal way gave them notice of her adverse claim, and that the evidence was insufficient to show any such notice of adverse claim until the execution and recording of the deed to Patrick M. Lynch; that one of the essential elements of title by adverse possession is, that at its inception it is acquired and is thereafter held in hostility to and in denial of the true title; that the possession of Mrs. Hull was acquired in subjection to and under the title of her husband, Millard F. Hull, and there is no evidence in the record to show she ever claimed any other or different title until the execution by her of the deed to her brother Patrick M. Lynch. The master further found that the equities were with the complainants and recommended that partition be decreed as prayed in the bill.

Objections were filed to the master's report, which were overruled, and exceptions of the same nature were then filed, which were also overruled. The court entered a decree in accordance with the recommendations of the master, partitioning the premises as prayed in the bill, one-half to appellees, as the natural heirs-at-law of Millard F. Hull, according to their several interests as found, and one-half to Patrick M. Lynch, as grantee of Mary A. Hull, widow

of Millard F. Hull. Appellants, Patrick M. and James W. Lynch, have perfected an appeal to this court.

The questions presented for determination as preserved by the objections and exceptions to the master's report and the assignments of error to the decree of the lower court are, whether or not Mary A. Hull, under the circumstances as shown by the evidence, acquired title to the premises, under section 1 of the Statute of Limitations, by twenty years' adverse possession, and whether appellees, as heirs-at-law of Millard F. Hull, are precluded by the same section from maintaining their bill.

There is practically no dispute as to the evidence. Both parties claim the land through Millard F. Hull. His ownership of the land at the time of his disappearance and presumed death is alleged in the bill and admitted by the answer, as is also the heirship of the parties. Accordingly, for the purposes of this suit it can be assumed that Hull, the owner of the land, died intestate June 8, 1878, leaving his widow and heirs-at-law as alleged in the bill of complaint; that at the time of his death, intestate, his widow was in possession of the land and became seized of an undivided one-half thereof as heir-at-law and entitled to dower in the other half. Subject to said dower interest one-half of said land became the property, by descent, of the appellees, brothers and sisters of the deceased and their descendants. Mary A. Hull and those under whom appellees claimed were tenants in common of said land, and the effect of section 1 of the Statute of Limitations, under which appellant Patrick M. Lynch claims, must be considered with reference to this situation of the parties.

To establish a title under section 1 of the Limitation act not only must there be twenty years' continuous, uninterrupted possession, but such possession must be hostile in its inception and so continue. It must be visible, exclusive and notorious, and be acquired and retained under claim of title inconsistent with that of the true owner. All these

elements must concur. (*Downing v. Mayes*, 153 Ill. 330; *Reuter v. Stuckart*, 181 id. 529; *Clark v. Jackson*, 222 id. 13; *Lambert v. Hemler*, 244 id. 254; *Kinsella v. Stephenson*, 265 id. 369.) Tested by the above rule, the taking and holding possession of the land by Mary A. Hull was not hostile or adverse. It must be remembered that at the time she acquired possession her husband was living, as far as known, and the possession she took was because of his ownership of the land and his absence and was in attornment to his title. This was the character of her possession when he is presumed to have died, whereupon she became seized of an undivided one-half of said land as his heir, with the right of dower in the other half. She was a tenant in common with the other owners and had taken possession under rightful claim and not adversely. While it is true that one tenant in common can obtain title by limitation against his co-tenants, it must be by acts that would amount to a disseizin. There must be something more than mere possession and an appropriation of the rents and profits and payment of taxes to bar the rights of a co-tenant. The evidence must be stronger than that necessary to establish ordinary adverse possession. There must be outward acts of exclusive ownership of an unequivocal character, and of such a nature as by their own import will give notice to the co-tenants that an actual disseizin is intended to be asserted against them. (*Peabody v. Burri*, 255 Ill. 592.) Where one claims title by adverse possession and limitation against co-tenants, the co-tenants must be given notice in some way that an adverse possession is being asserted against them in order that the statute may commence to run. (*Donason v. Barbero*, 230 Ill. 138, and cases cited; *McMahill v. Torrence*, 163 id. 277; *Sontag v. Bigelow*, 142 id. 143; *Long v. Morrison*, 251 id. 143.) In *Sontag v. Bigelow*, *supra*, the court said (p. 154): "Here the defendant did nothing to apprise the plaintiffs that he was claiming to be the absolute owner of the en-

tire premises except to receive the rents and pay the taxes, which in the case last cited [*Ball v. Palmer*, 81 Ill. 370,] was held to be insufficient. Had the defendant, before he went into the possession of the property, acquired title or color of title from a stranger and entered claiming the land under such title, then he might properly invoke the Statute of Limitations as a bar. But he does not occupy that position. He acquired the title of the heirs of Alfred Bigelow, who were tenants in common with plaintiffs, and entered into possession under such title, and, so far as appears, never gave the plaintiffs notice that he was claiming under any other or different title."

*Kirby v. Kirby*, 236 Ill. 255, was a case similar in some respects to the case at bar. In that case, in speaking of the elements necessary for a surviving husband to establish a title by twenty years' adverse possession as against the children and heirs-at-law of his deceased wife, who in her lifetime was the owner of the land, this court said, on page 264 of the opinion: "We do not think, under the circumstances of this case and the relation of the parties to each other, that appellees have established title in Joshua Kirby by twenty years' adverse possession. As the surviving husband of Mary E. Kirby, Joshua Kirby had an estate of homestead in the premises and had a right to reside thereon. He was also entitled to dower in the residue of the land. While his dower was never assigned, yet the fact that he had a right of dower and homestead in the premises, and the further fact that the owners of the fee were his children, would require acts on his part of the most unequivocal character to render this possession adverse to his children. In *Zirngibl v. Calumet Dock Co.* 157 Ill. 430, it was held that the adverse possession required to constitute a bar to the assertion of the legal title by the owner must be 'hostile or adverse, actual, visible, notorious and exclusive, continuous, and under a claim or color of title.' The same rule was announced in *Downing*

v. *Mayes*, 153 Ill. 330, and many other cases to be found in our Reports. From the earliest decision in this State to the present time it has been held that a party claiming title by adverse possession must prove his possession was adverse to the true owner, by clear and positive evidence. This cannot be established by inference, but the proof must show clearly that the party in possession claimed the land as his own, openly and exclusively. In *White v. Harris*, 206 Ill. 584, this court said (p. 592): 'A party claiming title by adverse possession always claims in derogation of the right of the real owner. He admits that the legal title is in another. He rests his claim, not upon a title in himself as the true owner, but upon holding adversely to the true owner for the period prescribed by the Statute of Limitations. Claiming a benefit from his own wrong, his acts are to be construed strictly.' (*Cornelius v. Giberson*, 25 N. J. L. 31.) 'Adverse possession cannot be made out by inference or implication, for the presumptions are all in favor of the true owner, and the proof to establish it must be strict, clear, positive and unequivocal.' (*Zirngibl v. Calumet Dock Co.* 157 Ill. 430.) The rule is, that every presumption will be made in favor of the holder of the legal title, and no presumption will be made in favor of the holder of color of title only." In the same case, on page 266 of the opinion, it is said: "In *DeWitt v. Shea*, 203 Ill. 393, the widow of a deceased owner occupied and lived upon lands for more than forty years after the death of her husband, and it was held this possession was not adverse. In *Musham v. Musham*, 87 Ill. 80, and *Riggs v. Girard*, 133 id. 619, it was held that the occupation by a widow of lands of her deceased husband in which she had right of homestead and dower, however long continued, could not be regarded as adverse to the heirs. The statute under which the dower right accrued in these cases gave the widow the right to the possession of the dwelling house and the plantation thereto belonging until the assignment of

her dower. This was called the widow's quarantine, and was abolished by the act of 1874. In *Reuter v. Stuckart*, 181 Ill. 529, a bill was filed by a surviving husband for the assignment of homestead and dower in real estate alleged to have been owned by complainant's deceased wife at the time of her death. The deceased wife of complainant was a widow when he married her, and her former husband, by whom she had five children, was the owner of the premises, and at the time of his death, December 29, 1874, the family resided on the premises in controversy. The bill alleged that complainant's deceased wife had been in the adverse possession of the premises continuously since 1876 to her death, in 1897, and that during all that period the heirs of the former husband of complainant's wife had done nothing whatever to assert title to the land. The court said in that case (p. 543): 'We have held that the possession by the widow, under her statutory right, of the dwelling house and land is not adverse to the title of the heirs but is entirely consistent and in harmony with such title. (Citing cases.) It follows that in this case Mrs. Reuter acquired no title by an adverse possession of twenty years.' "

The record in this case is barren of any facts or circumstances showing notice on the part of Mary A. Hull to her co-tenants, or any of them, that she was claiming the land adversely, prior to the time she conveyed the premises by deed to Patrick M. Lynch. Some of the heirs-at-law of Hull, under whom appellees claim, resided in the vicinity of the land and others did not. Several of them disappeared and have not been heard from for several years and are presumed dead, the same as Hull. It must be inferred from the language of the deed made in 1911, from Mrs. Hull to Patrick M. Lynch, that both Mrs. Hull and Lynch had full knowledge of the rights and interests of appellees in the land as heirs-at-law of Hull. As between co-tenants, exclusive possession of land and the appropriation of all the



rents and profits and the payment of taxes cannot be relied upon by the possessors with notice as barring the rights of co-tenants, unless the fact that such possession was hostile is brought to the notice of such co-tenants. (*Donason v. Barbero, supra.*) It is true that Mrs. Hull was in possession of the land and collected all the rents and profits, but these circumstances, alone, are not sufficient to establish a title by limitation, particularly as against tenants in common. (*McMahill v. Torrence, supra; Sontag v. Bigelow, supra; Long v. Morrison, supra.*) It is impossible to lay down a rule as to what constitutes a disseizin by adverse possession in every case. Much depends upon the situation of the parties, the property involved and the opportunity of the parties in interest to know and appreciate all the circumstances. Each case stands on its own peculiar facts, and so must this case. While it has been often held by this and other courts that a title by limitation can be obtained by a tenant in common against co-tenants, and many of such cases have been cited by counsel for appellants in their able and exhaustive brief, in all these cases it was held that co-tenants against whom a limitation title was asserted either had actual notice of the hostile and adverse possession of the claimant, or the facts and circumstances were such that notice of adverse possession was necessarily implied. Those cases are distinguished in the opinion in *Peabody v. Burri, supra.* We are aware of no authority which holds that mere possession is sufficient.

A consideration of the facts and circumstances in the case at bar leads to the second point urged by counsel for the appellants, that the appellees are barred by reason of their *laches* from maintaining this suit. The case at bar differs from any of the authorities to which we have been referred in this: The right of appellees to bring an action for their interest in the premises dated from the death of their ancestor, and his death was merely presumed. The widow and his relatives continued making inquiries to as-

certain if he were living or dead, and his whereabouts, for many years after his disappearance. There were rumors that he was still living. One witness said he had a conversation with Mary A. Hull relative to a statement by a sister of the witness that she had seen Millard F. Hull in Wellington, Kansas, somewhere along before 1885. The heirs who had an interest in this land could hardly be expected to take the necessary steps to assert their rights with the same promptness as they otherwise would had the fact of their ancestor's death been established beyond any doubt. Undoubtedly there existed in their minds the hope, and even the belief, that he would some day return, and there is nothing in the record which would indicate that they were aware of the legal presumption that a man is dead after he has disappeared and not been heard from for seven years and that they could assert their rights as heirs-at-law after their ancestor was presumed dead. In fixing the period in which claims will be barred by *laches*, equity follows the law, and, as a general rule, where the period of limitation is fixed by statute under which a claim will be barred in courts of law, courts of equity will by analogy adopt the same period of limitation. It is only when the delay is accompanied by some other element rendering it inequitable to permit the owner to assert his title that *laches* will bar his right within the statutory limitation period. (*Compton v. Johnson*, 240 Ill. 621.) There was nothing in the acts of appellees, or anything done by Mrs. Hull or her grantee, Lynch, by reason of the delay and acquiescence of appellees, whereby the latter should be estopped from asserting their title. We infer from the record, judging from the amount of cash rent that was paid in certain years, that the land reasonably rented for \$300 and upward, annually, during most of the time it was rented by Mrs. Hull, and while the amount of rent received is not shown nor the amount expended for improvements, the master found that the improvements and repairs were only such as were nec-

essary to keep the place in condition to rent, and it would seem that the receipts from rents far exceeded the amounts expended for taxes, repairs and such small improvements as were put on the place. Nor is the appellant Patrick M. Lynch in any position to complain. He undoubtedly knew all about the ownership of the land. The terms of the deed by which he took title expressly stated that the grantor claimed to own the entire premises by reason of a limitation title, and he undoubtedly was aware of the fact that the grantor, his sister, aside from any title she claimed from limitation, was the owner of one-half of the property as heir-at-law of her husband. As shown by the evidence, he only paid about one-half what the land was worth. While this evidence was objected to and its admission is assigned for error, we think it is proper in connection with the other facts and circumstances of the case. It is a circumstance which, standing by itself and unexplained, would seem to indicate that Lynch was only paying for what he was sure to get in any event,—that is, the undivided one-half interest in the land to which his sister had unquestionably a good title.

For the reasons given, we think the decree of the circuit court was right, and it will be affirmed.

*Decree affirmed.*

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THE CITY OF MT. CARMEL, Appellant, vs. GEORGE  
MCCLUNG *et al.* Appellees.

*Opinion filed October 27, 1915.*

I. SPECIAL ASSESSMENTS—*a paving ordinance should establish grade of concrete culvert.* An ordinance for improving a street by grading, curbing and paving the roadway, which includes the construction of a concrete culvert seventy feet long, with suitable wing-walls, should in some way establish the grade of the culvert, and should describe both the culvert and wing-walls with such certainty as not to leave the matter to the discretion of the builders.

2. *SAME*—*when county court need not pass upon certain objections.* If the county court, in a proceeding to confirm a special assessment, holds that the ordinance is so insufficient that it will not sustain any assessment, the court is not required to pass upon objections which would arise had the ordinance been valid.

3. *APPEALS AND ERRORS*—*what must appear in abstract of record.* Everything necessary to a decision of the questions raised by an appeal must appear in the abstract of record.

APPEAL from the County Court of Wabash county; the Hon. W. S. WILLHITE, Judge, presiding.

IRA F. WOOD, for appellant.

P. J. KOLB, and M. J. WHITE, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The city of Mt. Carmel filed in the county court of Wabash county its petition for the confirmation of a special assessment to pay the cost of an improvement of Sixth street by grading, curbing and paving the roadway with reinforced concrete, with a concrete curb and a concrete culvert. The court sustained objections to the ordinance filed by the appellees, whose property had been assessed, on the grounds that the grade of the concrete culvert was not established, the description of the culvert and wing-walls was indefinite and uncertain, and the estimated cost was in gross and not itemized, as required by law. Judgment against the property of the appellees was refused, and the city appealed.

The abstract of the record is very defective. It does not contain the ordinance, but there are what purport to be portions of it under the heading of the estimate of cost by the president of the board of local improvements, other portions are printed as part of the ordinance, and still other portions appear in the bill of exceptions in questions propounded to witnesses as having been read from the ordi-

nance. Everything necessary to a decision of questions raised by an appeal must appear in the abstract. It is impossible to find out anything very definite about the ordinance from the abstract, but enough appears to show that no grade was fixed for the culvert, which was a material part of the improvement. It was to be seventy feet in length, with suitable wing-walls at the ends, and to be constructed of concrete, the wing-walls and footings not to exceed two cubic yards in volume. It was to be located at the crossing of a ditch about two hundred feet easterly from the Southern railway and was to follow the general course of the ditch. It was to have a clear span of nine feet, and a height at the center line of Sixth street of three feet seven and a half inches from the top of the wall footings to the lower side of the cover. It is said by counsel that a grade was fixed for the center line of Sixth street, but that part of the ordinance is not in the abstract, and if it were, it would not indicate how far below that grade the top of the culvert was to be nor anything about the grade. The wing-walls were not described, and both as to them and the main structure witnesses said they would have to use their discretion. The ordinance was insufficient and the court did not err in sustaining the objections to it. *DeWitt County v. City of Clinton*, 194 Ill. 521; *Pierson v. People*, 204 id. 456; *McDowell v. People*, 204 id. 499; *Harris v. People*, 218 id. 439.

A cross-error has been assigned by a property owner on a failure of the court to pass on his objection that certain lots assessed were not contiguous to the improvement. The court having decided that the ordinance was insufficient to sustain any assessment was not required to pass upon objections that would have arisen if the ordinance had been sufficient.

The judgment is affirmed.

*Judgment affirmed.*

GEORGE W. BOWERS *et al.* Plaintiffs in Error, *vs.* WILLIAM D. EVANS *et al.* Defendants in Error.

*Opinion filed October 27, 1915.*

1. APPEALS AND ERRORS—*when certificate of evidence is sufficient to present error as to instructions.* Upon a writ of error to review a decree sustaining a will where the assignment of errors and argument in support thereof relate only to the giving and modifying of instructions, it is sufficient for the certificate of evidence to state in a general way what facts were proved, that each party introduced evidence tending to prove the issues in his favor, and that the evidence upon the issues of undue influence and unsoundness of mind was conflicting.

2. WILLS—*when it is not error to give instruction stating the ultimate question as to mental capacity.* It is not error to give an instruction giving the capacity of the testator to understand the particular business in which he was engaged as the test of testamentary capacity, particularly where other instructions state the various elements embraced in such ultimate test, including his ability to know what property he possesses and who are the natural objects of his bounty and to understand the nature and consequences of his act in making the will.

3. SAME—*it is not improper for instruction to tell jury what kind of influence is regarded as undue.* Where undue influence is charged in a bill to set aside the probate of a will, it is not improper to state to the jury in an instruction what kind and degree of influence exercised over a testator is regarded in law as undue and sufficient to destroy his free agency.

4. SAME—*what statement in instruction does not increase complainant's burden of proof.* An instruction in a will contest case stating that upon making the statutory proof the validity of the paper as a will would be *prima facie* "established," does not throw upon the complainants a greater burden than that of proving their claims by a preponderance of the evidence, particularly where the instruction recognizes the right of the complainants to prove either want of mental capacity or undue influence.

WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

E. E. BONE, and ROBERT H. PATTON, for plaintiffs in error.

CLARENCE A. JONES, and THOMAS D. MASTERS, (HARDIN W. MASTERS, of counsel,) for defendants in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The plaintiffs in error, heirs-at-law of John B. Evans, deceased, filed their bill in the circuit court of Sangamon county to set aside the probate of his will, alleging that at the time of its execution he was ninety-one years of age and not of sound mind and memory, and was prevailed upon to execute the will by the undue influence of William D. Evans, to whom the entire estate was given by the will. Upon a trial by jury a general verdict sustaining the will was returned, together with answers to special interrogatories that the testator, at the time of the execution and attestation of the will, was of sound mind and memory and was not unduly influenced by the defendant William D. Evans. A decree was entered dismissing the bill, and a writ of error was sued out of this court to review the decree.

The certificate of evidence recites that the defendants gave in evidence the will, the certificate of the oaths of the witnesses at the time of the probate, and proved that the will was executed in strict compliance with all legal formalities in the manner required by the statutes, and gave in evidence testimony tending to prove the issues in their favor; that the complainants gave in evidence on their behalf testimony tending to prove the issues in their favor, and that the evidence was conflicting upon the issue of the soundness of mind of the testator and also on the issue of undue influence. The assignment of errors, and argument in support of the same, relate only to the giving and modifying of instructions, and the method adopted to bring the assignment of errors before the court was a proper one. *Illinois Central Railroad Co. v. O'Keefe*, 154 Ill. 508; *Costly v. McGowan*, 174 id. 76.

The instructions given to the jury were both numerous and lengthy, covering thirty-seven printed pages of the abstract, stating, in varying forms, practically every rule of law relating to testamentary capacity and undue influence and applying the same to the case on trial. The court, by the instructions, first stated to the jury the nature of the suit, the issues formed and questions to be determined, and then advised the jury that the intention of the court was simply to instruct as to the law and not in the least degree to give to the jury any opinion as to what the evidence tended to prove or disprove or as to the weight or sufficiency of the testimony or the credibility of the witnesses, and that the instructions were given as one connected body and series and were to be so regarded by the jury. The instructions as to the law followed and were unusually full and complete, and as a series stated settled rules of law for determining questions of testamentary capacity and undue influence. Many of those given at the instance of the defendants are criticised, but we do not think it necessary or profitable to take up each one of the number and analyze them at length and most of them will be treated in a general way.

The most important objections, and those most insisted upon, relate to the sixth instruction given at the instance of the defendants. It stated as a test of testamentary capacity the question whether the testator, at the time of executing the paper offered as a will, had sufficient mind and memory to know and understand the particular business in which he was engaged in making and executing the same. The test so stated is objected to as insufficient because it omitted the particular essentials to testamentary capacity: that the testator had capacity to know his property, capacity to know who were the natural objects of his bounty, and capacity to understand the nature, consequences and effect of the act in which he was engaged in making his



will. In determining the capacity of a person to do an act or transact a particular business, the ultimate question is whether he had sufficient mental capacity to know and understand the particular business in question, (*Sears v. Vaughan*, 230 Ill. 572,) and the instruction correctly stated the final question to be determined by the jury. In *England v. Fawbush*, 204 Ill. 384, the court said, on page 399: "The doctrine of this court is, that the testator has testamentary capacity if at the time of making the instrument purporting to be his will he has such mind and memory as enables him to understand the particular business in which he is then engaged." In *Johnson v. Farrell*, 215 Ill. 542, it was said that the real question to be submitted to the jury was whether the testator, at the time of making his will, had sufficient mind and memory to enable him to understand the particular business in which he was then engaged. The business in which a testator is engaged at the time of making his will is the disposition of his property by that instrument, (*Wetzel v. Firebaugh*, 251 Ill. 190,) and that was the particular business in which the testator in this case was engaged when he made his will. In determining whether a testator, at the time of making his will, has such mind and memory as to understand the business in which he is engaged there are various elements to be taken into account, such as capacity to know his property, who are the natural objects of his bounty and the nature and consequences of his act, and if either of these elements is lacking he does not have sufficient mental capacity to execute a will. (*Dowie v. Sutton*, 227 Ill. 183.) It is proper to tell the jury that capacity to know these things is necessary to enable the testator to understand the business in which he is engaged when he attempts to dispose of his property by will, but they are all included in the general statement. The jury in this case could not have regarded those things as excluded because the court

told them by the twelfth instruction, also given for the defendants, that in deciding the question whether the testator had an understanding of the act he was then performing in making his will the jury were to determine whether he had a recollection of the property he had and meant to dispose of, and could recall to his mind who were the natural objects of his bounty and affection and the manner in which he meant to distribute his property in reference to them. By the thirteenth instruction given at the request of the defendants the standard set up for the testator was, sufficient mental capacity to attend to the ordinary business affairs of life and that when he executed the will he understood the nature and character of the business in which he was then engaged. By the ninth instruction given at the request of the complainants the elements of old age, disease and mental impairment were included, and it required that the testator should be capable of knowing and determining the natural objects of his bounty and the character and quantity of his property and to understand the nature and effect of the disposition he was making of his property, and the jury were advised that if either of these elements was lacking he would be of unsound mind and memory and not have sufficient mental capacity to execute a will. The court did not err in stating to the jury the ultimate question concerning testamentary capacity to be determined, and by other instructions the jury were given various tests included in the general rule.

Instruction No. 6 is also objected to because it said that upon making the statutory proof the validity of the paper as a will would be *prima facie* established, as the word "establish" threw upon the complainants a greater burden than that of proving their claims by a preponderance of the evidence. The statement only gave *prima facie* effect to the statutory proof, and following that statement it recognized the right of the complainants to prove either the want of

mental capacity or undue influence. The instruction is not subject to the objection.

Instruction No. 7 is objected to as being argumentative, assuming that the influence of William D. Evans was secured through affection, advice and mere persuasion and singling out certain facts as not sufficient to prove undue influence. It was not argumentative and did not assume any fact but correctly stated the law as to the nature of influence which is regarded as undue, and it omitted no important fact which there was evidence tending to prove. It was not improper to state to the jury what kind and degree of influence exercised over a testator is regarded in the law as undue and sufficient to destroy his free agency.

It is said that instruction No. 12 has three vital faults. This is the instruction already referred to, stating that the testator must have had mental capacity to understand the nature of the act he was performing, a recollection of his property, and been able to recall the natural objects of his bounty and the manner of distribution among them. The first objection is that the court assumed that the testator was aware that he was making a will; the second objection is that the instruction ignored the question of undue influence; and the third objection is that the instruction omitted the essential elements of being able to recall his property and the natural objects of his bounty. For the purpose of this argument the instruction is divided into three paragraphs, but read as a whole it is not subject to criticism.

There is no other instruction which requires attention and none which did not state rules of law frequently declared by this court.

Complaint is made that the court modified the third instruction offered by the complainants. As offered, the instruction stated that where a person receives the larger share of the property of a testator by his will, and where

such person is one in whom the maker reposes confidence and trust at the time of the execution of the will, and where such beneficiary causes the will to be prepared and is present at the time of the execution, such facts are circumstances tending to show the exercise of undue influence. The instruction then recited alleged facts conforming to that statement, and concluded that such facts, if proved, were proper to be considered, in connection with all the other evidence, in determining the question of undue influence. The court modified the instruction by making the first rule the same as the last,—that the facts mentioned, if proved, were circumstances to be considered by the jury on the charge of undue influence. The modification did not change the purport of the instruction.

The decree is affirmed.

*Decree affirmed.*

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• IKE PRICE, Appellant, vs. HARRY SOLBERG *et al.* Appellees.

*Opinion filed October 27, 1915.*

1. PLEADING—*facts in contract which is made part of bill control.* Where a bill for specific performance makes the contract a part of the bill, if any facts alleged in the bill differ from the facts stated in the contract the latter must control in case of demurrer, as a demurrer does not admit the truth of such inconsistent allegations of the bill.

2. SPECIFIC PERFORMANCE—*when proposed vendors are not required to convey.* Where a contract for the sale of land provides that the money deposited on the purchase price shall be refunded if the title to the property does not prove good, the proposed vendors are not bound to convey if the proposed vendee objects to the abstract of title, and they may treat the objections as ending the contract and may thereafter convey to another party. (*Briszolaro v. Mosher*, 71 Ill. 41, followed.)

APPEAL from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding.

WINSTON & LOWY, for appellant.

RUDOLPH D. HUSZAGH, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill brought by appellant against appellees praying for the specific performance of a contract for the sale of certain real estate. A demurrer was filed thereto and sustained by the trial court, the bill being dismissed for want of equity. This appeal followed.

Appellees Israel Saslafsky and Joseph Saslafsky on November 30, 1914, were the owners of two lots and a brick building thereon at 661 Liberty street, Chicago. On said date they signed the following instrument, their names being appended according to the Hebrew spelling:

"CONTRACT FOR THE SALE OF REAL ESTATE.

"November 30, 1914.

"Received of Ike Price one hundred dollars as part payment towards the purchase of the following described real estate: 661 Liberty street, brick building, which is hereby bargained and sold to the said Ike Price for the sum of twenty-two hundred dollars, thirteen hundred dollars more to be paid on the delivery of a good and sufficient warranty deed of conveyance for the same within fourteen days from this date, or as much sooner thereafter as the deed is ready for delivery after the title has been examined and found good, and the balance to be paid as follows: The balance of \$800 is subject to a mortgage, to be secured by trust deed or mortgage on the property above described. Should the title to the property not prove good then this \$100 to be refunded, but should the said Ike Price fail to perform this contract on his part promptly at the time and in the manner above specified, (time being of the essence of this contract,) then the above one hundred dollars shall be forfeited by.....as liquidated damages, and the above contract shall be and become null and void.

ISRAEL ZASLAWSKY, (Seal)

"Signed in the presence of J. <sup>his</sup> X ZASLAWSKY. (Seal)  
mark  
(Seal) Moses Ginsberg, Notary Public."

This instrument was filed for record in the recorder's office of Cook county on the same date it was signed. On December 2, 1914, the bill alleges the above named appellees gave to the attorney of appellant an order on the holder

of the abstract for its continuation and examination. Appellant paid the cost of the continuation and on December 15, 1914, received an opinion of title from his attorneys, which he immediately delivered to the Saslafskys. This opinion contained nineteen objections to the title. A few days thereafter the appellant was notified by the Saslafskys that they refused to cure any of the objections, and that if he desired the title he would have to take it subject to all objections and liens and would have to assume all special assessments and outstanding tax sales and judgments, and unless he would accept such title they would refuse to convey the property and their wives would refuse to waive their dower and homestead rights. December 31 the Saslafskys and their attorney called at the office of the attorney of appellant and repeated the refusal to clear title and made the same statement as to taxes, assessments and other liens. Appellant refused to accept conveyance on such conditions. Thereafter the Saslafskys sold the property to appellee Harry Solberg, the deed to Solberg being recorded December 31, 1914. The bill alleges that said Solberg knew of the existence of the contract between appellant and the Saslafskys, and that the attorney for the latter held the purchase money paid by Solberg with a view to securing the relinquishment of appellant's rights, but that appellant refused to accept any offer of settlement, alleging that he had been ready and willing to comply with the terms of the agreement and pay the balance of the purchase price and also waive certain of the objections made to the title and waive also the dower and homestead rights of the wives of the Saslafskys. Appellant asked that the deed to Solberg be declared null and void and that an accounting be had as to the rents collected by him, agreeing to pay any sum found due after a proper accounting, in accordance with the allegations of the bill.

The instrument herein quoted was made a part of the bill by reference and attached as an exhibit. The demurrer

alleged that there was a variance between the allegations of the bill and said contract of sale; that under the terms of the contract the Saslafskys had a right to convey to other parties when appellant objected to the title; that the acceptance of appellant was made after the property had been sold to Solberg; that the contract does not contain any provisions binding appellant to purchase said premises nor take the same, and that it lacked mutuality because not signed by both parties.

The contract being made a part of the bill, if any facts alleged in the bill differ from the facts stated in the contract the latter must control. The demurrer will not admit the truth of such inconsistent allegations of the bill. (*Greig v. Russell*, 115 Ill. 483; *Armstrong v. Building Ass'n*, 176 id. 298.) The only question in this case is as to the proper construction of this contract. While it did provide as to future payments if the title, after examination, was found good, it also provided that should the title not prove good then the \$100 paid was to be refunded. The title was examined and found not satisfactory. The Saslafskys were so notified and refused to cure the objections.

This contract is very similar in its wording to one construed by this court in *Brizzolara v. Mosher*, 71 Ill. 41. The reasoning in that case we think controls here. The parties here, as there, did not propose to convey a perfect title but a deed with covenants of warranty. Here, as there, it was provided that if the title did not prove good the payment advanced was to be refunded. As was said in that case, the object of these provisions was apparently to avoid disputes about the title, and if the purchaser was dissatisfied with the title the seller could find another purchaser. Neither party could embarrass the other. The fact that appellant was willing to waive certain of the objections does not create a right to specific performance, because the Saslafskys had already been led to believe by these objections that appellant did not want the property unless a bet-

ter title was furnished. They were justified on this record, under this contract, in considering the deal at an end at the time the objections to the title were submitted to them by appellant.

The decree of the circuit court will be affirmed.

*Decree affirmed.*

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EUGENIA MEILY *et al.* Plaintiffs in Error, *vs.* ROBERT S. KNOX, Exr., *et al.* Defendants in Error.

*Opinion filed October 27, 1915.*

1. *WILLS*—rights of legatees who are to receive proceeds of the sale of certain land devised to trustee. Where the only gift to named legatees is a direction that they shall receive the proceeds of the sale of a certain tract of land devised to a trustee so far as such proceeds will go, their rights are limited to the proceeds of the sale of the particular land, and if the devise to the trustee is revoked by a sale of the land by the testatrix in her lifetime the bequests fail.

2. *SAME*—devise revoked by conveyance of the land by testator. In Illinois a devise is revoked by a conveyance of the land by the testator during his lifetime.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. M. L. MCKINLEY, Judge, presiding.

S. C. IRVING, for plaintiffs in error.

FOREMAN, LEVIN & ROBERTSON, for defendants in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

The superior court of Cook county, after a hearing, dismissed for want of equity a bill brought for the purpose of having the will and codicil of Sarah J. Tucker construed and the legacies provided in the third clause of the will and codi-



cil declared to be valid and directed to be paid by the executor. The complainants appealed to the Appellate Court for the First District, which affirmed the decree, and a writ of *certiorari* has been allowed to bring the record before this court for review.

Mrs. Sarah J. Tucker executed her will on March 2, 1909. The third clause is as follows:

"*Third*—I give and devise unto my sisters, Mary Wood, Nellie Mildren, Bessie Knox, Annie Detweiler, Lottie Poland and Emily Villa, and unto my brother, William J. Cooke, share and share alike, my property located in Lima, Allen county, Ohio, and more particularly described as follows, [description of property,] to be sold by them and out of the proceeds thereof to pay the following bequests, so far as the proceeds will go, in the order indicated:

"(a) To my step-son, Chester Tucker, of Lima, Ohio, two thousand dollars (\$2000.)

"(b) To my step-daughter, Mrs. George H. Meily, (*nee* Eugenia Tucker,) of Lima, Ohio, one thousand dollars (\$1000.)

"(c) Two thousand dollars (\$2000) for the erection of a monument on my lot in Oakwood Cemetery.

"(d) Fifteen hundred dollars (\$1500) to be expended to place a memorial window in the Episcopal church founded by my beloved husband in said Lima, Ohio.

"(e) One thousand dollars (\$1000) to be invested by the trustees of the Oakwood Cemetery of Chicago, Illinois, for the purpose of defraying the expenses of keeping my lot in said Oakwood Cemetery in good order and condition."

There was a residuary clause disposing of all the residue of her property, and her nephew, Robert S. Knox, was named as executor. The next day after executing the will Mrs. Tucker executed a codicil, which is as follows:

"*Codicil*—I, Sarah J. Tucker, of Chicago, declare this to be my first codicil to my last will executed on March 2, 1909:

"1. Devise all of the real estate of which I may die seized, and all of the shares of capital stock in Chicago Railways, American Smelting, United States Steel owned by me at my death, to my sister Lottie Poland, as trustee, with full power to sell same or any part or any interest therein, convey perfect title to said property or any part; and I do hereby direct my said trustee to distribute the proceeds realized from the sale of any or all of said property equally between my sisters and brother named in my last

will and testament, the proceeds realized from the sale of the Lima, Ohio, property, however, to be subject to the specific bequests provided in and by my said last will and testament in paragraph 3 thereof.

"I do hereby re-affirm my last will of March 2, 1909, except only as modified and controlled by this my first codicil, dated March 3, 1909."

On December 2, 1909, the testatrix sold the property in Lima, Ohio, and received therefor the sum of \$7370.98. She died on January 26, 1910. Her estate consisted of some shares of stock in several corporations, \$1786.10 in cash, \$1524.25 of personal effects, and certain real estate in Cook county. The plaintiffs in error are the step-daughter of the testatrix named in the third clause of the will, and the church therein mentioned. A separate answer was filed by the Oakwood Cemetery Association, admitting the allegations of the bill and stating that upon a proper construction of the will and codicil the association was entitled to receive out of the assets of the estate \$1000 under the third clause of the will and codicil.

It is the position of the plaintiffs in error that by the terms of the will and codicil it was the intention of the testatrix that the several sums of money specified in the third clause of the will should be paid out of the assets of the estate; that they were made a charge upon the Lima property; that upon the sale of that property prior to the decease of the testatrix the legacies became general charges upon the remainder of the real and personal estate of the testatrix, and that the persons named in the third clause of the will are entitled to be paid the several amounts therein stated, out of the general assets of the testatrix. The case has been argued on the part of the plaintiffs in error on the theory that the amounts named in the third clause of the will were demonstrative legacies, payable first out of the proceeds of the Lima property, but if that property should prove not available or insufficient, then payable out of the general assets of the estate. It has been argued on the part of the de-

fendants in error on the theory that the third clause of the will constituted a specific devise of land, with instructions to sell and make distribution of the value, and not a bequest of legacies to be paid primarily, but not exclusively, out of a designated fund; that the devise and legacies were therefore specific and not demonstrative, and that by the sale of the property by the testatrix in her lifetime both the devise and the legacies were adeemed.

The effect of the third clause of the will and the codicil was to devise the real estate in Lima, Ohio, to Lottie Poland as trustee, to sell, and distribute the proceeds among the persons named in the third clause so far as such proceeds would go. There was no gift to the persons named, aside from the direction to the trustee as to the distribution of the proceeds of sale. Whether any of such persons should receive any amount, and if so, how much, depended upon the sale of the real estate by the trustee and the amount received from such sale. There is nowhere in the will any evidence of an intention to give the persons named any amount except such as might be received from the sale of the real estate. Their rights depended entirely on the devise of the real estate to the trustee. In this State a devise of land is revoked by a conveyance of the land by a testator during his lifetime. (*Phillippe v. Clevenger*, 239 Ill. 117.) The rights of the plaintiffs in error being dependent upon the devise to the trustee, and that devise having been revoked by the testatrix's conveyance of the subject matter, there was no basis left for them to claim any interest in the estate under the third clause of the will and the codicil.

The superior court properly dismissed the bill, and the judgment of the Appellate Court affirming the decree will be affirmed.

*Judgment affirmed.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. EDWARD PURCELL *et al.* Plaintiffs in Error.

*Opinion filed October 27, 1915.*

1. CRIMINAL LAW—to charge the offense of an attempt to commit larceny indictment must allege failure. To charge the offense of an attempt to commit larceny it is essential that it be charged and proven not only that some overt act was done towards the commission of larceny, but that the person making the attempt failed in the perpetration of the offense or was intercepted and prevented in its execution.

2. SAME—indictment should allege value of property attempted to be stolen. In Illinois, where grand larceny is a felony and petit larceny a misdemeanor, the value of the property attempted to be stolen is a material allegation of an indictment for an attempt to commit larceny in order to determine the crime committed and the punishment to be inflicted, and it follows that where an attempt is made to steal from the person of one who has nothing of value on his person capable of being stolen no crime has been committed.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. ADELOR J. PETIT, Judge, presiding.

CHARLES C. WILLIAMS, and THOMAS E. SWANSON, for  
plaintiffs in error.

P. J. LUCEY, Attorney General, MACLAY HOYNE,  
State's Attorney, and GEORGE P. RAMSEY, (DWIGHT McKAY, of counsel,) for the People.

Mr. JUSTICE COOKE delivered the opinion of the court:

Plaintiffs in error, Edward Purcell and Charles Hannon, were convicted in the criminal court of Cook county of an attempt to commit the crime of larceny, and the jury found by their verdict that the value of the property attempted to be stolen was \$50. Motions for a new trial and in arrest of judgment were overruled and plaintiffs in error were sentenced to the penitentiary. Reversal of the judgment is asked upon two grounds: First, that the indictment is so fatally defective that it will not support the conviction; and

second, that the verdict is not supported by the evidence. We will consider only the first of the points presented.

The indictment was returned under section 1 of division 2 of the Criminal Code, which is as follows: "Whoever attempts to commit any offense prohibited by law, and does any act towards it but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished, when the offense thus attempted is a felony, by imprisonment in the penitentiary not less than one, nor more than five years; in all other cases, by fine not exceeding \$300, or by confinement in the county jail not exceeding six months." (Hurd's Stat. 1913, p. 864.)

The first count of the indictment charges that plaintiffs in error attempted to steal the personal property of Anebior Anebiou from his person, but that they failed in the perpetration of the offense and were intercepted in the execution of the same. This count does not contain any charge as to the value of the property attempted to be stolen. The second count, omitting the formal part, charges that plaintiffs in error, "devising and intending unlawfully and feloniously to steal, take and carry away from the person of one Anebior Anebiou, whose true name is to said jurors unknown, a large sum of money, to-wit, the sum of \$50, lawful money of the United States of America, of the value of \$50, the personal goods, money and property of the said Anebior Anebiou, which said money the said Anebior Anebiou then and there did have in the pockets of the said Anebior Anebiou, did then and there with said intent stealthily and secretly endeavor to, and did, thrust, insert and put the hands of them, the said Edward Purcell and the said James Hannon, into the pockets of the said Anebior Anebiou, contrary to the statute."

By our statute larceny is defined to be the felonious stealing, taking or carrying, leading, riding or driving away the personal goods of another, and it is provided that private

stealing from the person of another shall be deemed larceny. Our statute divides the crime of larceny into two grades. Where the property stolen exceeds the value of \$15 the larceny is made a felony, and the punishment is fixed at imprisonment in the penitentiary for not less than one year nor more than ten years. Where the property stolen is of the value of \$15 or less the crime is made a misdemeanor, and the punishment is imprisonment in the county jail not exceeding one year and a fine not exceeding \$100. The second count of the indictment does not charge plaintiffs in error with any crime. The charge made in this count constitutes an essential part of both the crime of grand larceny and the crime of an attempt to commit grand larceny. The count does not charge either that the crime of larceny was completed or that plaintiffs in error failed in the perpetration of the offense or were intercepted in the execution of the same. To charge the offense of an attempt to commit larceny it is essential that it be charged and proven not only that some overt act was done towards the commission of larceny, but that the person making the attempt failed in the perpetration of the offense or was intercepted and prevented in its execution. This is one of the material and essential elements of an attempt to commit the crime, and the second count of the indictment is fatally defective in failing to allege the failure.

It is urged on behalf of the People that the word "attempt" itself implies a failure, and that by necessary implication the second count must be held good. There might be some force to this contention if the word "attempt" or its equivalent had been used in the second count. The count contains no language from which it must necessarily be implied that the parties accused failed in the accomplishment of their designs.

It is not contended on the part of the People that the first count is sufficient to support the verdict in this case, but it is contended that this is a good count for an attempt to commit petit larceny, under our statutes. In support of this

contention the case of *Commonwealth v. McDonald*, 5 Cush. 365, and cases in various other jurisdictions which have followed the Massachusetts case, are cited. As *Commonwealth v. McDonald*, *supra*, seems to be the leading case in this country on the question there involved and as it will serve to illustrate the difference between our statute and the statutes in other States, we will note only that case. In that case McDonald was convicted of an attempt to steal from the person, and the judgment of conviction was affirmed by the Massachusetts Supreme Court. Massachusetts has a statute making it a crime to attempt to commit an offense prohibited by law which is almost identical with section 1 of division 2 of our Criminal Code above set out. It was there contended, as here, that the indictment should have set out particularly the property attempted to be stolen and its value, but the court points out that as the punishment under the laws of Massachusetts for the crime of stealing from the person does not depend on the amount stolen, there was no occasion for any allegation as to value in an indictment charging an attempt to commit that offense. It was there held that it was not necessary to describe the goods attempted to be stolen, nor was it necessary that there should have been anything in the pocket of the person which could have been stolen, as the offense was complete by the general attempt to steal and the act done towards the commission of the offense by McDonald by thrusting his hand into the pocket of the person from whom he was attempting to steal. As the character of the completed crime did not depend at all upon the amount stolen, the court properly held, as we view it, that an attempt to steal anything from the person of another constituted the crime defined by the statute of Massachusetts, and even though there was nothing of value upon the person of the one upon whom the attempt was made or anything capable of being stolen, the attempt having been made and having failed, the crime was complete. The Massachusetts court expressly confined the decision to the par-

ticular case under consideration,—an attempt to steal from the person,—stating as its reason for so doing that there may be cases of attempts to steal where it would be necessary to set out the particular property attempted to be stolen and the value.

The difference between the statute of Massachusetts and our statute is quite apparent. While in that State the punishment for the crime of stealing from the person does not depend upon the amount stolen, in this State it does. In this State, if the amount stolen exceeds the sum of \$15 the crime is that of grand larceny, which is made a felony. If the amount stolen is \$15 or less the crime is that of petit larceny, which is punishable by imprisonment in the county jail and a fine. The value of the property attempted to be stolen therefore becomes material in order to determine the crime committed and the punishment to be inflicted. In order to charge one with an attempt to commit petit larceny it is necessary to allege in the indictment, and prove, that the property attempted to be stolen was of the value of \$15 or less, and in order to charge one with an attempt to commit grand larceny it is necessary to allege and prove that the value of the property attempted to be stolen was more than \$15; and this is true whether it is an attempt to steal property from the person or otherwise. This necessarily leads to the conclusion that where an attempt is made to steal from the person of one who has nothing of value on his person or nothing capable of being stolen no crime has been committed. This conclusion is not in conflict with the rule announced in *Commonwealth v. McDonald*, *supra*, and the cases which have followed it in other jurisdictions, but results from the provisions of our statute defining the crime of larceny and fixing the punishment therefor.

As both counts of the indictment are fatally defective, the motion in arrest of judgment should have been sustained.

The judgment of the criminal court is reversed.

*Judgment reversed.*



THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, vs.  
THE ESTATE OF THIES J. LEFENS, deceased, Appellee.

*Opinion filed October 27, 1915.*

1. **APPEALS AND ERRORS**—*when the question of competency of a witness is immaterial.* Whether the wife was a competent witness to testify to any or all of the matters to which she testified is immaterial on appeal in an inheritance tax case, where the facts were clearly proved by other competent testimony which is not contradicted.

2. **EVIDENCE**—*when books of account are competent evidence to prove claim against an estate.* Books of account are competent evidence to prove a claim against an estate in an inheritance tax case, where it is shown that the entries were made under the direction of the deceased; that he had access to the books and frequently examined them; that he was an experienced book-keeper, was familiar with the books and took off a trial balance at the end of each year, figuring the interest himself before he made the balance.

3. **SAME**—*when objection to testimony of witnesses as to what was shown by books is obviated.* An objection to testimony of witnesses as to what was shown by books of account is obviated by the introduction in evidence of a stipulation as to what was shown by such books.

4. **LIMITATIONS**—*when the Statute of Limitations does not run in favor of agent.* The Statute of Limitations does not begin to run against the principal and in favor of his general investing agent upon each item as received, and where there is a continuing general agency it cannot be terminated during the life of the parties, so as to set the Statute of Limitations in motion, until an accounting is had or a demand therefor made and refused or there is an express repudiation of the agency.

5. **SAME**—*when Statute of Limitations does not run as between husband and wife.* Where a wife, by power of attorney, appoints her husband as her agent for the investment and management of her estate, with power to sell and control her property, both real and personal, to the same extent she could, and with the right to re-invest the proceeds, the husband is under obligation to account and pay over when demand is made, but in the absence of any demand or breach the Statute of Limitations does not begin to run as to any of the claims and accounts between them during the continuance of the agency.

APPEAL from the County Court of Cook county; the Hon. JOHN E. OWENS, Judge, presiding.

P. J. LUCEY, Attorney General, THOMAS J. YOUNG, and JOHN J. POULTON, for the People.

WINSTON, PAYNE, STRAWN & SHAW, (SILAS H. STRAWN, FREDERICK C. HACK, and JOHN D. BLACK, of counsel,) for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The only question in this case is whether the claim of Marie C. Lefens against the estate of her husband, amounting to \$1,571,697.33, should have been deducted from the amount of the estate in determining the inheritance tax. The county court allowed the deduction and the People have appealed.

The facts are these: Mrs. Lefens was the daughter of Conrad Seipp, who died in January, 1890, leaving a large estate, a part of which was devised to Mrs. Lefens. On February 28, 1890, Mrs. Lefens executed two powers of attorney, constituting her brother, William C. Seipp, and her husband, Thies Jacob Lefens, her attorneys in fact, authorizing them, jointly and severally, among other things, to collect and receipt for all moneys, rents, demands and choses in action due or to become due her; to represent her in the settlement and administration of her father's estate; to collect and receipt for all sums of money or personal property, of every kind, to which she might be entitled under her father's will or under the laws of the State; to invest and re-invest all moneys that might come to their hands for her; to take charge of, care for and manage all of the real estate owned by her, pay all taxes thereon, make all necessary repairs, execute leases, collect and receipt for all rent; to sell such real estate and execute deeds of conveyance therefor; to employ attorneys; to commence and

prosecute suits, and, in general, jointly and severally to do and perform all and every act which she could personally do in regard to all her real and personal property. Thereafter funds came to the hands of William C. Seipp and Thies Jacob Lefens from the estate of Conrad Seipp for Mrs. Lefens which amounted to \$275,690.76 on May 1, 1891, when they were transferred to Thies Jacob Lefens alone. From that date to the death of Lefens an account was carried on his books embracing charges against him and credits in favor of Mrs. Lefens of the net income of certain parcels of real estate owned by Mrs. Lefens, the proceeds of sale of her real estate, the interest, dividends and returns from certain property belonging to her contained in another account called "Marie Lefens Inventory Account," and interest for the use by Lefens of the money so received by him.

The inventory account just referred to was an account beginning August 24, 1891, in which Lefens is charged and his wife credited with certain stocks, bonds, notes and mortgages which were in the name of Mrs. Lefens. From that date to the death of Lefens this inventory account was continued, and showed at his death a balance charged against him and in favor of Mrs. Lefens of \$626,480.49. Separate accounts were kept also for separate parcels of real estate owned by Mrs. Lefens. Each shows a credit to Lefens for each item of expense concerning the particular parcel of real estate and a charge for the rent or income therefrom, the net proceeds or balance being in each case carried into the general account first described, at the end of each fiscal year. The total balance of the general account to Mrs. Lefens' credit at the time of her husband's death was \$2,198,177.82. This included the balance of the inventory account of property standing in Mrs. Lefens' name but charged against her husband, the difference between the two accounts (\$1,571,697.33) constituting the claim of Mrs. Lefens in controversy.

The first ground of error insisted upon is, that the court admitted the testimony of Mrs. Lefens as to transactions occurring in her husband's lifetime and as to conversations with and admissions made by him during the marriage. Whether she was competent to testify to all or any of the matters about which she testified is immaterial, for the facts were clearly proved by other competent testimony which was not contradicted and there is really no controversy as to them.

It is next contended that the books of account of Thies Jacob Lefens were not competent evidence to prove the claim against his estate. It is immaterial whether the books were books of original entry or whether such preliminary proof was made as would entitle them to be admitted as evidence in favor of the estate. No attempt was made to use them for any such purpose. It was shown that the entries in these accounts were made under Lefens' direction; that he had access to the books and frequently examined them; that he was an experienced book-keeper, was familiar with the books and took off a trial balance at the end of each year, figuring the interest himself before he made the balance. This was sufficient evidence of his admission of the correctness of the entries made in the account and the book was therefore evidence against him and his estate. (*Bartlett v. Board of Education*, 59 Ill. 364; *Butler v. Cornell*, 148 id. 276.) Without reference to their being books of account or of original entry, they were competent as admissions by Lefens of the receipt of Mrs. Lefens' funds. Certain witnesses were permitted to testify to what was shown by the books, and it is insisted that this was error. There was a stipulation as to what the books showed, which was admitted in evidence, and obviated any objection to the testimony of these witnesses.

It is finally contended that the claim being for money loaned or advanced, and having accrued more than five years before the death of the decedent and not being evi-

denced by writing, is barred by the Statute of Limitations. The powers of attorney executed by Mrs. Lefens clearly show the conditions under which her property was taken possession of by her husband. By these instruments he was constituted her agent for the investment and management of her estate. He had power to sell and control her property, both real and personal, to the same extent that she could, with the right to re-invest the proceeds. He was under an obligation to account and pay over to her whenever she might demand an accounting or payment, but he was guilty of no breach for which she could bring suit against him until his refusal to account or pay over. As long as the relation of principal and agent existed there was nothing to set the Statute of Limitations in operation as to claims and accounts between them. (*McHarry v. Irvin*, 85 Ky. 322; *Shepherd v. Shepherd*, 108 Mich. 82; *Lamb v. Ward*, 114 N. C. 255; *Patterson v. Lilly*, 90 id. 82; *Cole v. Baker*, 16 S. D. 1.) Payment was not contemplated until Mrs. Lefens requested it. Her money was placed with her husband as her agent, to invest, sell and re-invest, and there was no intention that each item received should be paid forthwith to her. The Statute of Limitations does not begin to run against the principal and in favor of his general investing agent upon each item as received, and where there is a continuing general agency it cannot be terminated during the life of the parties, so as to set the Statute of Limitations in motion, until an accounting is had or a demand therefor made and refused or there is an express repudiation of the agency. *Teasley v. Bradley*, 110 Ga. 497; *Rucker v. Maddox*, 114 id. 899; *Kane v. Mackellar*, 109 N. Y. 215; *Bacon v. Rives*, 106 U. S. 99.

In the case of *Selleck v. Selleck*, 107 Ill. 389, Warren W. Selleck had received from his sister \$3000 in Cook county bonds and given her a receipt for them, stating "the interest to be used by me while in my possession, to be de-

livered to her whenever called for." The sister died after some years without having called for the bonds and it was insisted that the right to sue for them was barred by the Statute of Limitations. It was held, however, that the agreement clearly was that there should be no duty to return the bonds until an actual demand should be made, and the permission to retain them having continued until the sister's death, the statute would not bar her estate until the lapse of a sufficient time after her death.

It is argued on behalf of the People that Mrs. Lefens never had any intention of claiming the property but regarded it as her husband's, and this is supposed to be conclusively demonstrated by the fact that she never did claim it or demand an accounting in her husband's lifetime. It is not surprising that a wife should permit her husband to manage her business for more than five years without demanding an accounting. Payments were made to her and for her account, and in view of the confidence which frequently exists in the conjugal relation, a wife not skilled in business ought not to be regarded as negligent who fails to call a husband who is an able business man to a strict financial accounting at least every five years. We have seen that this is not required in the ordinary case between man and man, and no more does the law require it between man and wife. The evidence is that Mrs. Lefens permitted her husband to manage her affairs as long as he lived, and this was naturally to be expected under the circumstances, so long as domestic harmony prevailed.

It is insisted that Mrs. Lefens having presented her claim against the estate for money loaned is bound by her claim as filed and cannot now take a different position. The question is as to the validity of this claim. It has been allowed in the probate court and must be deducted unless shown to have been improperly allowed. The form of the claim is immaterial. It was claimed that the estate owed Mrs. Lefens this amount of money. It may be that

upon objection the claim should have been amended in the probate court. The evidence shows, not a loan of money but a deposit for investment. But the formal defect in the claim does not affect its merits and cannot be taken advantage of in this collateral proceeding. The evidence does not show that the claim is not lawfully due from the estate.

The county court properly allowed the deduction, and its judgment is affirmed.

*Judgment affirmed.*

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PETER DRAGOVICH, Admr., Appellee, vs. THE IROQUOIS IRON COMPANY, Appellant.

*Opinion filed October 27, 1915.*

1. CONSTITUTIONAL LAW—*every presumption must be indulged in favor of constitutionality of law.* Where the constitutionality of a law is involved every presumption must be indulged and every reasonable doubt resolved in favor of its validity.

2. SAME—*a law will not be held unconstitutional unless it is clearly proved so.* A law will not be declared unconstitutional unless it is clearly proved that the requirements of the constitution have not been observed; and this rule applies to the constitutionality of a law when any defect is claimed in its passage.

3. SAME—*constitution does not require that legislative journals shall show affirmatively that a bill was printed.* The constitution does not require that the legislative journals shall show affirmatively that a bill or its amendments have been printed.

4. SAME—*when it will be inferred that the amendments were printed.* Where the journal shows that the amendments to a bill were ordered to be printed and engrossed and that the committee on engrossed bills reported that the amendments were engrossed it will be inferred that the amendments were printed in compliance with the order, if there is nothing in the journal indicating the contrary. (*Neiberger v. McCullough*, 253 Ill. 312, and *McAuliffe v. O'Connell*, 258 id. 186, explained.)

5. SAME—*Workmen's Compensation act of 1911 is not invalid.* The Workmen's Compensation act of 1911 is not invalid upon the alleged ground that it was not passed in the manner required by the constitution, in that the journals of the legislature did not show affirmatively that the amendments to the bill were printed.

6. WORKMEN'S COMPENSATION—*when injury is one "arising out of and in the course of the employment."* The provision of section 1 of the Workmen's Compensation act of 1911 that compensation may be had for accidental injuries sustained by an employee "arising out of and in the course of his employment," applies to an employee who had momentarily left the duties in which he was engaged to attempt to save the life of a fellow-employee, who, while engaged in his duties, had fallen through a hole in the floor of the shop into a quantity of hot water and was screaming for help.

7. SAME—*when a verdict is not insufficient.* A verdict of the jury in the circuit court on appeal from an award under the Workmen's Compensation act of 1911, which finds the issues "in favor of the petitioner and that he is entitled to compensation," is not insufficient on the ground that it should have fixed the amount of compensation and stated from whom recoverable, where there is only one defendant and the amount of compensation to which the petitioner is entitled is merely a matter of computation under the evidence and the provisions of the act.

DUNN and COOKE, JJ., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding.

ALBERT G. MILLER, for appellant.

FRANK A. ROCKHOLD, and CHARLES C. SPENCER, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a proceeding to recover compensation, under the Workmen's Compensation act of 1911, for the death of Frank M. Markusic. The case was tried in the circuit court of Cook county on an appeal from a report or award of the board of arbitrators, rendered in accordance with section 10 of said Compensation act. On the trial in the circuit court a judgment for \$3500 was entered in favor of appellee, payable in installments, in accordance with the terms of the statute. From that judgment this appeal was taken direct to this court on the ground that said Workmen's Compensation act is unconstitutional.



On a hearing in the circuit court the journals of the house and senate were introduced, and it is argued from them that it does not appear that twenty-three amendments to said bill were printed before the final passage of the bill. The senate journal shows that the bill was introduced, amended and passed. The house journal shows that the bill was received from the senate and having been printed and read the first time was referred to a committee; that the committee afterward reported the bill back with twenty-three amendments, with a recommendation that the amendments be adopted and that the bill as amended do pass. Thereafter the bill was ordered to a second reading, and upon such reading the committee's amendments were offered and adopted. The journal proceeds: "There being no further amendments, the foregoing amendments, numbered 1 to 23, inclusive, were ordered printed and engrossed." The bill was then ordered to a third reading. The committee on enrolled and engrossed bills reported that the house amendments had been correctly engrossed, and later the record shows that the bill was taken up, read at large a third time and passed by a vote of 98 yeas to 2 nays. The senate journal shows that two days later the bill was taken up in the senate, and the question then being, "Shall the senate concur with the house of representatives in the adoption of the following amendments (1 to 23) to the bill?" and the yeas and nays being taken, it was decided in the affirmative by a vote of 35 yeas, nays 1.

Counsel for appellant argues that under the rulings of this court in *Neiberger v. McCullough*, 253 Ill. 312, and *McAuliffe v. O'Connell*, 258 id. 186, this law, on account of the minutes of the journal, must be held unconstitutional; that it is necessary, in order to hold it constitutional, to find in the journal affirmative evidence that the amendments were actually printed before the final vote. The precise question raised in this case was not considered

or passed upon in either of the cases just cited. In this case the journal shows that the amendments were ordered printed, while in those cases there was no such entry in the journal. In *McAuliffe v. O'Connell*, *supra*, we stated (p. 189): "The journals of both houses fail to show that the amendments proposed by said conference committee were ever printed, or ordered to be printed, in either house," thereby strongly intimating that if the amendments had been ordered printed the act under consideration in that case might have been held constitutional. In the *Neiberger case*, *supra*, nothing was said to the contrary. We have repeatedly held that where the constitutionality of a law is involved every presumption must be indulged and every reasonable doubt resolved in favor of its validity. It is a familiar doctrine of this court that laws will not be declared unconstitutional unless it is clearly proved, beyond a reasonable doubt, that the requirements of the organic law have not been observed. (*People v. Brady*, 262 Ill. 578, and cases cited; *People v. Henning Co.* 260 id. 554; *Home Ins. Co. v. Swigert*, 104 id. 653.) This same rule applies to the constitutionality of a law when any defect is claimed in its passage. In *Larrison v. Peoria, Atlanta and Decatur Railroad Co.* 77 Ill. 11, it was held that where a law was signed by the presiding officers of both houses and approved by the Governor, it would be presumed to have been passed in accordance with all the constitutional requirements and to be valid until the presumption was overcome by clear and convincing proof.

The constitution does not require that the legislative journal shall show affirmatively that the bill or its amendments have been printed. In discussing this question in *Chicago Telephone Co. v. Northwestern Telephone Co.* 199 Ill. 324, we said (p. 342): "Where the constitution does not require a fact to be recorded upon the journal and it can be inferred from the recital in the journal that such fact existed or such step was taken, then the pre-

sumption will be indulged that such fact did exist or such step was taken in order to sustain the validity of the law, where the contrary does not appear from the journal itself. \* \* \* So, here, inasmuch as the record recites that the ordinance was laid over under the rules, and inasmuch as the rules require that it shall be presented and read before it lies over for one week, the presumption will be indulged that the rule was complied with, not only in regard to the presentation of the ordinance but also in regard to the reading of it." This court had this rule in mind in *Neiberger v. McCullough*, *supra*, for in that case, in discussing this very question, we referred to the discussion in the opinion just quoted from and approved this rule as there laid down. The facts here bring this case squarely within that rule. The journal shows that the amendments were ordered printed. Nothing appears on the journal to indicate that the order was not complied with, and it must be presumed, under this rule, that these amendments were actually printed before the final passage of the bill. Not only did the journal show that these amendments were ordered printed, but the rules of both the senate and the house required that all amendments should be printed before being passed. By an unbroken line of decisions this court has held that the presumption must be that a public officer has pursued the course pointed out by law and has performed his duty, until the contrary is shown. (*Ballance v. Underhill*, 3 Scam. 453; *Grubb v. Crane*, 4 id. 153; *People v. Newberry*, 87 Ill. 41; *Long v. Linn*, 71 id. 152; *People v. Walsh*, 96 id. 232; *Hogue v. Corbett*, 156 id. 540; *State v. Illinois Central Railroad Co.* 246 id. 188; *People v. Cincinnati, Lafayette and Chicago Railway Co.* 256 id. 280.) To hold on this record that this law is unconstitutional would be extending the doctrine of the *Neiberger* case further than it has been extended in that or any other case in this court. Indeed, under the rules laid down by this court in the cases relied

on by appellant, as the journal shows that the amendments were ordered printed, it will be presumed, as nothing is shown to the contrary, that they were printed. The law must therefore be held constitutional.

Counsel for appellant further argues that even though the law be held constitutional appellee could not recover under the Compensation act as the record does not show that he was injured while in the course of his employment by the appellant. The evidence shows that the deceased, Frank M. Markusic, had been in the employ of appellant, the Iroquois Iron Company, for a number of years, doing different kinds of work about appellant's plant, sometimes in the buildings and sometimes on the dock. On December 24, 1912, he was working in the shop of appellant, assisting in making some safety appliances. Max Gornick, with two or three other men, was working in the same shop repairing steam pipes under the floor, and for this purpose some of the steel plates forming the floor had been taken up, thereby leaving an opening or hole, in which was accumulated a quantity of hot water from which were escaping vapor and steam, making it impossible for a person approaching the opening from where Markusic was working, to see the hole. Gornick, while engaged in this work, slipped and fell into the opening and into the hot water and screamed for help, crying out in Croatian, which was the native language of Markusic: "For good God! pull me out, people! pull me out!" At this cry, the testimony is, Markusic dropped his work and ran toward the place from which the cry came. The steam and vapor coming from the water so obscured the opening that he fell into the hole and was so badly scalded that he died from the effects two days later. Gornick was being assisted out by others just as Markusic fell in. The distance from where deceased was working to the place where the accident occurred is estimated by witnesses to be from 100 to 150 feet. In traveling between the two points he would

have to go about 50 or 75 feet south and then about 50 feet west around a boiler. The place of the accident could not be seen, apparently, from the place where deceased worked.

Section 1 of the act requires that compensation may be had for accidental injuries sustained by any employee "arising out of and in the course of the employment," etc. From the facts already stated, counsel for appellant argues that it was not shown that the accident arose out of and in the course of deceased's employment. This provision of the statute has never been construed by this court but somewhat similar acts have been construed by the courts in other jurisdictions. Under these authorities it is clear that it is the duty of an employer to save the lives of his employees, if possible, when they are in danger while in his employment, and therefore it is the duty of a workman in his employ, when occasion presents itself, to do what he can to save the lives of his fellow-employees when all are at the time working in the line of their employment. Any other rule of law would be not only inhuman but unreasonable and uneconomical, and would, in the end, result in financial loss to employers on account of injuries to their employees. From every point of view it was the duty of the deceased, as a fellow-employee, in the line of his duty to his employer, to attempt to save the life of his fellow-employee under the circumstances here shown. That he failed in his attempt does not in the slightest degree change the legal situation. The reasoning of the following cases tends to support this conclusion: *Rees v. Thomas*, 1-4 W. C. C. 9; *Matthews v. Bedworth*, 1 id. 124; *London and Edinburgh Shipping Co. v. Brown*, 42 Scottish L. R. 357.

Counsel insists that there is no proof in the record that Gornick, the man who first fell into the hot water, was working in the line of his employment at the time of the accident. The burden of furnishing evidence from which the inference can be legitimately drawn that the death

of the employee was caused by an accident "arising out of and in the course of the employment" rested upon the claimant. (*Bryant v. Fissell*, 86 Atl. Rep. [N. J.] 458.) We think the evidence clearly shows that Gornick was at work in the line of his employment at the time he fell into the opening, and that on principle and authority, under the circumstances shown here, it must be held that the deceased, Markusic, was working in the line of his employment, under this statute, at the time he was injured.

Counsel for appellant further insists that the verdict of the jury was not sufficient to sustain this judgment. The verdict read: "We, the jury, find the issues in favor of the petitioner and that he is entitled to recover compensation." Counsel argues that the jury should have found the amount of compensation and from whom the administrator was entitled to recover. With this we do not agree. It is quite customary for verdicts, even in common law cases, to recite, "We, the jury, find the issues in favor of the plaintiff," etc., without stating that the recovery shall be against the defendant. We see no reason why it was necessary in this case for the jury to state against whom the verdict was rendered. There was only one defendant, and if the petitioner was to receive compensation at all it must be from the defendant. Section 4 of this statute provides that if the employee leaves a widow, child or children to whose support he had contributed within five years previous to his death, the compensation shall be "a sum equal to four times the average annual earnings of the employee," but not less, in any event, than \$3500. (*Hurd's Stat.* 1911, p. 1138.) The proof showed, without contradiction, that the deceased left a widow and minor child. It was stipulated during the trial that the average weekly wages of the deceased for more than a year prior to his death were \$19.25 and that he had contributed to the support of his wife and children within five years preceding his death. The act provides that the matters shall be first submitted

to arbitration, as was done in this case, and further provides, in section 10, that either party to such arbitration shall have the right to appeal from such report or award to the circuit court, as was done in this case, and "upon such appeal the questions in dispute shall be heard *de novo*," etc. There was no question in dispute as to the amount of the annual earnings of the deceased. From the record it is manifest that the amount that should be recovered was not in any way in dispute before the jury. The chief, if not the only, question in dispute was whether or not the administrator was entitled to recover anything for the death of the deceased. The stipulation fixed the annual weekly earnings, the verdict found the petitioner entitled to compensation and the statute fixed the method, therefore the determination of the amount was a mere mathematical operation, which was performed by the court in entering the judgment. Even in a common law action a verdict will not be reversed for mere informalities where they do not affect the merits of the case and justice has been done. (*Bates v. Williams*, 43 Ill. 494; *Bacon v. Schepplin*, 185 id. 122.) In *Hall v. First Nat. Bank*, 133 Ill. 234, in discussing a question somewhat similar, in principle, to that here, the court said (p. 243): "The form of the verdict was, 'We, the jury, find the issues for the plaintiff,' no damages being assessed by them. The reason for this appears to be that the defendants had suffered judgment to go against them by default, and the court thereupon assessed the damages and rendered final judgment. On a motion by the defendants to set aside the default and for leave to plead, that court stayed proceedings on the judgment and allowed the defendants to plead, but refused to set aside the judgment, allowing it to stand as a security for the plaintiff until the trial of the issue presented by the pleas. If the defendants failed to establish their defense, judgment was to stand. Under such circumstances the verdict of the jury was not erroneous in form or substance,

as the question of damages was not submitted to them." That case, on this point, was quoted with approval in *Dulle v. Lally*, 167 Ill. 485. The reasoning in those cases fully supports the conclusion that this verdict, on the facts found in this record, was sufficient to support the judgment. It might have been proper to have made the verdict more specific, but the informalities in no way affect the merits of the case.

We find no reversible error in the record. The judgment of the circuit court will be affirmed.

*Judgment affirmed.*

DUNN and COOKE, JJ., dissenting:

We dissent from the conclusion reached by the majority of the court. The record of the two houses fails to show that the twenty-three house amendments were printed before the vote was taken on the final passage of the bill. Testimony of members of the senate and house was offered and heard over appellant's objection, that the amendments were printed and on the desks of members before the final vote was taken on the bill. This testimony was incompetent. "The parliamentary history of an act or bill in the legislative journals is the only evidence that is recognized by the courts in this State, and the journals cannot be aided or contradicted by other documents or evidence of any kind." *People v. Brady*, 262 Ill. 578.

The failure of the legislative journals to show that the bill and all amendments thereto were printed before the vote upon the final passage of the bill renders a supposed enactment void. (*Neiberger v. McCullough*, 253 Ill. 312; *McAuliffe v. O'Connell*, 258 id. 186.) To sustain this act it is therefore necessary to find in the journals the evidence that the bill was printed before the final vote. The evidence is not there. The house journal shows that the amendments were ordered printed and engrossed and were afterward reported to have been correctly engrossed, but that is all. The senate journal as to these amendments



shows only that the senate concurred in them. There is no statement in either journal from which it can be inferred that they were printed in either house.

It is argued that every presumption must be indulged in favor of an enrolled act; that such presumption can be overcome only by the clearest evidence, and that evidence is admissible to cure mistakes or clerical errors in the keeping of legislative records. In *People v. Bowman*, 247 Ill. 276, we held, as had been held before, that the silence of the journals as to anything required to be shown is evidence of its non-existence, and in *Neiberger v. McCullough*, *supra*, that the printing of the bill and amendments before the final vote is a thing required to be shown by the journal. Therefore the failure of the journal to show that the amendments were printed is evidence that they were not printed.

Reference is made to the rules of the two houses as shown by the journal, the presumption of the regularity of the proceedings and the presumption that officers have done their duty. These presumptions have nothing to do with the case in hand. The constitution requires the printing of the bill and amendments, and we have held that this fact must appear from the journals of the two houses. The rules of the houses are no more binding than the requirements of the constitution, and there is no stronger presumption that they have been observed. No presumption of a compliance with this requirement will be indulged from anything which does not appear in the journals themselves. If they do not show that the bill was printed it will not be presumed that it was printed, even though the rules of the two houses required it as well as the provision of the constitution. In *Neiberger v. McCullough*, *supra*, we said, referring to the journals of the two houses of the legislature (p. 316): "The courts have not gone so far as to presume that things were done which cannot be inferred from the record to have been done." In that

case the court refused to infer from the certificates of the presiding officers of the senate and house, with the approval of the Governor, that the bill with all its amendments was printed though the constitution required that all amendments should be printed before the bill was put upon its final passage.

It is sought to be inferred that the amendments were printed because they were ordered to be printed and nothing appears on the journal to indicate that the order was not complied with, and because it must be presumed that the amendments were actually printed before the final passage of the bill for the reason that where the constitution does not require a fact to be recorded upon the journal and it can be inferred from the recital in the journal that such fact existed or such step was taken, then the presumption will be indulged that such fact did exist or such step was taken in order to sustain the validity of the law when the contrary does not appear from the journal itself. The only recital in the record from which it is sought to infer that the amendments were printed is the recital that they were ordered printed, and it is urged, as if it gave strength to the inference, that the rules of both the senate and the house required that all amendments should be printed before being passed. Rules, however, are sometimes disregarded and orders are sometimes not complied with, and it is by the record, only, that compliance with the rule and the order can be shown. If the presumption from the silence of the record is that the rule and the order were complied with then the amendments are to be regarded as having been printed, but the *Neiberger* case cited many authorities supposed to lay down the rule the other way and followed those authorities. If it could not be presumed that public officers have pursued the course pointed out by law and performed their duty in observing a constitutional requirement, the logic is not apparent of presuming that the same public officers have pursued the

course pointed out by law and performed their duty in observing a mere rule of the two houses of the legislature containing the constitutional requirement. Why so much greater strength of presumption in favor of a rule prescribed by the legislature than of a rule prescribed by the constitution? The *Neiberger case* either decided that the constitution required that the fact that all amendments to a bill were printed before it was placed upon its final passage should be recorded upon the journal, or it did not so decide. If it did not so decide and there is no such requirement, there is an end of the matter and courts and lawyers have merely been mistaken as to the decision. If it did so decide, then there is no room for presumptions as to regularity of proceedings and officers doing their duty. It is then to be determined from a reading of the record whether or not it states the amendments were printed, and, of course, there is no room for a difference of opinion as to that. In the *Neiberger case* it is said that the express provision of the constitution for the entry of the ayes and noes on the final passage of the bill carries with it not the slightest implication that other matters need not be entered, and the necessary result of the opinion is that the printing of the bill, and of all amendments thereto, before the bill is placed upon its final passage must also be entered in the journal. The court refused to presume such printing from the requirement of the constitution. In this case there is nothing additional except the requirement of the rule of the senate and house and the order to print. These requirements are no more binding than those of the constitution, and their mere existence, which is all that is shown, raises no presumption that they were complied with. The *Neiberger case* decided that the journals must show that the bill and all amendments were printed before the final vote was taken. This rule is abrogated by the decision now made and the questions left to be determined by presumption.

HENRIETTA VANZANTEN *et al.* Plaintiffs in Error, *vs.*  
JOHN VANZANTEN, JR., *et al.* Defendants in Error.

*Opinion filed October 27, 1915.*

1. DEEDS—*the grantor's intention is without effect unless deeds are delivered.* The fact that the grantor intended that his children should have the land described in their respective deeds is without effect to pass title unless the deeds are delivered.

2. SAME—*what will be held to be a parol partition.* Where the owner of land deeds the same in parcels to his children and puts each in possession of his or her respective parcel but the deeds are not delivered until after his death, when the widow and children meet, and after reading the last will of the deceased, which purports to devise all the estate to the widow, decide not to probate the will but to divide the land according to the deeds and the previous possession of the children, and they thereafter carry out such arrangement for several years, there is a parol partition, which those assenting to are estopped to deny in a court of equity.

3. EQUITY—*when parol partition may be decreed under a general prayer for relief.* Even though the specific prayer of a bill is to set aside a will and deed as clouds upon complainant's title, yet if there is a prayer for general relief the court may decree relief upon the ground there had been a parol partition of the land, where the bill alleges all the facts necessary for a specific prayer for such decree and the facts proven authorize it.

WRIT OF ERROR to the Circuit Court of Cook county;  
the Hon. JESSE A. BALDWIN, Judge, presiding.

STEPHEN C. KNIGHT, (THOMAS E. D. BRADLEY, of  
counsel,) for plaintiffs in error.

FREDERIC R. DEYOUNG, for defendants in error.

Mr. CHIEF JUSTICE FARMER delivered the opinion of  
the court:

Nicholas VanZanten filed his bill in the circuit court of Cook county to remove a cloud upon his title to twenty-four acres of land in that county and to quiet his title. He died before the hearing and the suit was revived in the

name of his widow and children. Upon a hearing in open court the bill was dismissed for want of equity, and this writ of error has been sued out to reverse the decree.

John VanZanten, Sr., was a truck farmer and owned eighty-six acres of land near the village of South Holland, in Cook county. He had a wife, three sons, (Jacob, Nicholas and John, Jr.,) and two daughters, Nellie and Dora. Jacob, the oldest son, was a minister and resided in Wisconsin. In 1892 Nicholas, the second son, married and moved on the twenty-four acres of land in controversy, into a house erected by his father. John, Jr., the youngest son, was married in 1896 and remained in the old homestead, his father and mother removing to a new house erected by them close by. Dora was married in 1897 and with her husband resided upon a part of the eighty-six acres. Nellie never married but continued to live with her parents. In 1898 John VanZanten, Sr., was about sixty-three years old. On March 4, 1898, he and his wife signed two deeds,—one to Nicholas and the other to the unmarried daughter, Nellie. On June 3, 1898, they signed two more deeds,—one to John, Jr., and the other to Dora. The four deeds were acknowledged on June 8, 1898. On November 14, 1898, they signed two other deeds,—one to Jacob and another to John, Jr.,—which were acknowledged November 23, 1898. On May 9, 1899, they signed four more deeds, which were acknowledged May 16, 1899,—one each to Nicholas, John, Jr., Nellie and Dora. These deeds included eighty-six acres,—all the land John VanZanten, Sr., owned,—and were in the form of statutory warranty deeds purporting to be absolute conveyances in fee simple. On May 23, 1899, John VanZanten, Sr., executed his will, whereby, after providing for the payment of his debts and funeral expenses, he devised all of his estate, both real and personal, to his widow for life, with full power and authority to sell and dispose of the same, or any part thereof, in any manner she might deem proper, the remainder

undisposed of at her death to be divided equally among his five children. On June 24, 1905, John VanZanten, Sr., died, and four days later his widow and children met at his house, the deeds were taken from a tin box in which he had kept them since they were made, and delivered to the grantees named therein and were subsequently recorded. The will, which was also in the tin box, was taken out and read, and a contract written in the Dutch language was signed by the five children, as follows:

"SOUTH HOLLAND, ILLINOIS, *June 28, 1905.*

"Present, Mother VanZanten, Jacob, Klaas, John, Nellie and Dora VanZanten (Paarlberg.)

"Purpose of coming together is the opening of father's testament, made May 23, 1899. Everything found in the best order and carried out according to the reading and speaking of the testament. Furthermore it was found good for this year to pay mother one dollar for every acre for her support. Naturally each pays the taxes on his own land.

"Jacob and Dora offered to pay the tax and up-keep of the woodland and the eight acres by the Illinois Central railroad, and all what is left of the rent from these two pieces to give to mother."

On February 26, 1909, the will was admitted to probate and John VanZanten, Jr., was appointed executor. He filed an inventory, including the land in question. The personal property inventoried consisted of two notes for about \$500 each. On November 30, 1909, the widow, purporting to act under authority conferred by the will, conveyed to John, Jr., the twenty-four acres included in the two deeds to Nicholas. This deed, the inventory and the will of John VanZanten, Sr., constitute the cloud which the bill was filed to remove. The answer, among other things, denied the delivery of the deeds.

The plaintiffs in error insist that the deeds were delivered to their father so as to vest the title to the twenty-four acres in controversy in him. The circumstances immediately attending the signing and acknowledgment of the deeds and the execution of the will do not appear in evidence. No witness testified who had ever seen either one of

the deeds prior to the meeting after the death of John VanZanten, Sr., when they were taken from his tin box. There is evidence tending to show that statements were made by him that he had made deeds; that he said that all the family saw the deeds and everybody was satisfied and if he died there would be no trouble; that he got Jacob from Michigan and he read the deeds to the children and they were all well satisfied, and that Mrs. VanZanten said all the children were together and the old man gave each one a deed, which they read and were satisfied; that neither she nor her husband had changed their minds, and she did not intend to change the deeds because then she would not have a clear conscience. No witness testified the deeds were delivered by the grantor to his children, or to any facts or circumstances which would authorize the inference that they, or any of them, were delivered. The evidence makes it clear the grantor intended to give his children the land described in their respective deeds, but so far as the proof shows he kept the deeds in his possession and control. It is essential in order to pass title by deed that the deed be in some manner delivered. The intention of the grantor cannot be effective unless made so by delivery. *Abrams v. Beale*, 224 Ill. 496; *Wilenou v. Handlon*, 207 id. 104; *Walls v. Ritter*, 180 id. 616; *Weber v. Christen*, 121 id. 91.

The plaintiffs in error contend that if the deeds were never delivered by the grantor and no title passed during his life to the grantees by virtue of the deeds, by the voluntary action and agreement of the parties after the death of John VanZanten, Sr., they partitioned the land among themselves, in pursuance of which each continued in the possession and control of his or her respective parcel, without question or objection, until after the will was probated, about four years later. We think the legitimate inference from the evidence is that at the meeting of the children and widow of John VanZanten, Sr., a few days

after his death, it was agreed among all of them to accept the division of the land among them according to his plan and wish as indicated by the deeds; that an understanding was reached as to the disposition of the personal estate and as to the provision for the widow, and the will was not to be probated. This was not all embraced in the instrument signed by the five children, but that agreement, and other facts proved, to our minds warrant no other reasonable conclusion. The personal estate is variously stated to have amounted to from \$1000 to \$1500. By the consent of all of the children and the widow the deeds were delivered to the respective grantees, and the written agreement signed by all the children shows conclusively that it was the understanding that each of them was owner in severalty of the land described in his or her deed. Their father had long before put each of them in possession of the land intended for them, respectively, and given them complete management and control, they each paying to their father a small sum annually. This payment was not provided for by any written agreement but was the subject of a parol arrangement. Defendants in error insist that it was rental paid for the use of the land, but this is not justified by the evidence. The eighty-six acres of land were assessed in the name of John VanZanten, Sr., and the taxes paid by him. The sum paid him by the children after he signed the deeds and put them in possession of the land amounted to little more than the taxes, according to the evidence. Nicholas VanZanten paid \$24 per year for two or three years and afterwards \$51 per year. There can be no doubt John VanZanten, Sr., indicated by the deeds the division he wanted made of the land among his children and that this was known to them about the time the last of the deeds was executed. There was testimony that John VanZanten, Sr., told some of his neighbors he had given each of his children a place and had made them deeds. The



son Nicholas had been in possession of the land described in his deeds ever since his marriage, which occurred in 1892. He had sole management and control of it, received the income from it, paying annually to his father a sum sufficient to pay the taxes thereon. He made permanent and valuable improvements on the land both before his father's death and after the meeting of the children and the agreement among them subsequent to their father's death. The children were all adults, under no disability. They and the widow were the only persons having any interest in the estate, except creditors, and it is not claimed that the rights of any creditor are involved. The widow and children could by agreement make any disposition of the property they chose, regardless of the will. (*Cotterell v. Coen*, 246 Ill. 410.) Unquestionably the children, by their written instrument executed a few days after their father's death, agreed to a different disposition of the estate from that made by the will, and while the agreement was not signed by the widow, she was present when it was made and knew of and acquiesced in it. The deeds were in her possession, were procured from the place they were kept and delivered in pursuance of the agreement and understanding among the children. There was also evidence that some time afterwards the widow said she had no intention of interfering with the deeds; that she would not have a clear conscience if she did. Upon the faith of his ownership of the land Nicholas VanZanten continued to possess, control and manage the land and to make permanent and valuable improvements thereon. We are of the opinion that the agreement and action of the children of John VanZanten, Sr., at the meeting after his death, amounted to a parol partition of the land among them and vested the equitable title in each, of his or her respective portion. By their action and agreement they each accepted the portion of the land their father had intended for them, respectively. The fact that

they may have thought the deeds vested title in them can make no difference. They agreed to the partition as indicated in the deeds. No facts were concealed from any of them, no fraud was practiced, and what they agreed to and did was as valid a parol partition as if there had been no deeds. (*Ater v. Smith*, 245 Ill. 57.) Although the widow did not sign any agreement she is now estopped to deny the validity of the action of the children, which she knew of and acquiesced in at the time.

Defendants in error claim no relief can be granted on the ground that there was a parol partition for the reason that the bill is one to remove a cloud from the title assumed to be in plaintiffs in error, and that the specific relief prayed for is that the will of John VanZanten, Sr., the description of the property in the inventory, and the deed from the widow to John VanZanten, Jr., be decreed to be null and void as to Nicholas VanZanten's land and be set aside as clouds on his title. In addition to the specific relief prayed, the bill contained a prayer for general relief, and under some conditions, where complainant is not entitled, under the proof, to the specific relief prayed, he may be granted relief under the general prayer. In *Cook v. Martyn*, 2 Atk. 3, Lord Hardwicke is credited with having said: "Praying general relief is sufficient though the plaintiff should not be more specific in the prayer of the bill; and Mr. Robins, a very eminent counsel, used to say, general relief is the best prayer next to the Lord's prayer." Under the prayer for general relief a complainant may be given any relief the proof shows him entitled to, provided it is agreeable to the case made by the bill. (Story's Eq. Pl.—10th ed.—secs. 40, 41.) The allegations relied on must be such as to afford ground for the relief and must not have been introduced for the mere purpose of corroborating complainant's right to the specific relief prayed. Upon the general prayer the court may give every relief consistent with the case made by

the bill. (1 Daniell's Ch. Pl. & Pr. 437-439.) "Where the plaintiff prays for special and also for general relief, if the special prayer is such that no relief can be granted under it, the court may, under the prayer for general relief, grant any proper relief consistent with the case made by the bill. Relief may be granted under the general prayer different from that specifically prayed for when it is consistent with the facts alleged and proved, provided it does not take the defendant by surprise." (3 Ency. of Pl. & Pr. 348, 349.) The decisions in this State are in harmony with these general rules and principles. *Walker v. Converse*, 148 Ill. 622; *Hopkins v. Snedaker*, 71 id. 449; *Rankin v. Rankin*, 216 id. 132; *Cushman v. Bonfield*, 139 id. 219.

We are of opinion the allegations of the bill are sufficient to authorize relief under the general prayer on the ground that there was a parol partition of the land. The bill sets up all the facts that could have been alleged if it had declared there had been a parol partition and had specifically prayed the court to so decree. The parties on the trial had the opportunity to, and presumably did, offer all the proof they had which would throw any light on that question. The allegations of the bill and the specific relief prayed were such that both sides went fully into the acts and conduct of the parties now relied upon as entitling plaintiffs in error to relief under the general prayer. In this court those matters have been argued in the briefs of counsel on both sides, so that it does not now seem, in granting relief upon the ground of a parol partition, any of the parties have been taken by surprise or denied any right. As we view it, if we were to affirm the decree without prejudice to the right of the complainants to file a bill for relief on the specific ground that there had been a parol partition, the allegations of the bill as to facts relied upon would not be substantially different from the present bill nor would the proof of the material facts be different.

The decree of the circuit court is reversed and the cause remanded, with directions to enter a decree in accordance with the views herein expressed.

*Reversed and remanded, with directions.*

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THE PEOPLE *ex rel.* Mary Hegeler Carus, Appellee, *vs.*  
F. W. MATTHIESSEN, Appellant.

*Opinion filed October 27, 1915.*

1. CORPORATIONS—*by-laws will not take the place of a notice required by statute.* By-laws of a corporation providing for the holding of an annual meeting on a certain day each year, regardless of whether or not they provide the hour of meeting, will not take the place of a written notice of the meeting required by the statute under which the corporation was organized.

2. SAME—*what necessary to waive notice of meeting of stockholders.* Where a notice of the holding of an annual meeting is required by law to be given each year it must be given unless it is waived by all the stockholders, either expressly or by consenting to or participating in the meeting.

3. SAME—*what does not constitute participation in meeting of stockholders.* A stockholder who attends the annual meeting for the election of directors merely to demand that no business be transacted and who withdraws from the meeting after his effort to secure a pledge from the chairman that the meeting will do nothing but adjourn has failed, will not be deemed to have participated in the meeting to the extent of waiving his right to statutory notice thereof.

4. SAME—*the mere presence of stockholder at annual meeting is not, alone, sufficient to constitute waiver of notice.* The mere presence of a stockholder at an annual meeting of which notice is required to be given by statute will not amount to waiver of notice where the stockholder refuses to consent to the meeting and takes no part therein.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. JOE A. DAVIS, Judge, presiding.

WILLIAM J. CALHOUN, and M. F. GALLAGHER, for appellant.

GEORGE WILEY, State's Attorney, and MONTGOMERY, HART, SMITH & STEERE, (CHARLES S. CUTTING, N. H. PRITCHARD, and J. D. DICKERSON, of counsel,) for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court :

The People, on the relation of Mary Hegeler Carus, individually and as trustee under the will of Edward C. Hegeler, deceased, appellee, filed an information in the nature of a *quo warranto* in the circuit court of LaSalle county against the appellant, F. W. Matthiessen, calling upon him to show by what authority he was exercising the office of director of the Matthiessen & Hegeler Zinc Company, an Illinois corporation. The plea of appellant set forth his election as a director on December 18, 1913, and averred title to the office by virtue of such election. The circuit court found that the appellant had been duly and regularly elected a director of the company at a stockholders' meeting held December 18, 1913, and a judgment of not guilty was entered. This judgment, on appeal, was reversed by the Appellate Court for the Second District and a judgment of ouster was entered. The cause is brought here by appeal on a certificate of importance.

The sole question involved is whether the meeting of December 18, 1913, was a legal meeting of the stockholders of the corporation. It is the claim of appellee that as the notice of the meeting required by law was not given, any action taken was invalid, while appellant contends that sufficient notice was given, and if not, that all the stockholders were present, and it was therefore immaterial whether notice was given.

The corporation was organized in 1871 under a general incorporation act passed in 1857. (Laws of 1857, p. 161.) The capital stock was divided into 426 shares, and these

shares were distributed among F. W. Matthiessen and Edward C. Hegeler and the members of their immediate families, the members of each family owning 213 shares. Section 6 of the act of 1857, under which the company was organized and which became a part of the charter of the corporation, provides that an annual election of directors shall be held at such time and place as the board may designate, and a written or printed notice of such election shall be given to each stockholder personally or sent to him through the mail at least fifteen days before the day of the election, and the election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy. It is conceded that the notice required by this section of the statute was not given of the meeting of December 18, 1913. The by-laws of the company provide that the annual meeting of the stockholders for the election of a board of four directors shall be held at the office of the company, in the city of LaSalle, on December 18 of each year, excepting when that day shall fall on Sunday, in which case the meeting shall be held on the following day. The hour for holding the meeting is not fixed in the by-laws.

There was no material controversy as to the facts. It appears that the notice of the annual meeting required by the statute had never been given, but ever since the organization of the company the stockholders met by common consent some time during December 18 of each year, usually about the hour of ten o'clock A. M., for the annual election of the board of directors. If for any reason it did not suit the convenience of either appellant or Hegeler to meet at the office of the company, the meeting, by consent of all the stockholders, was held elsewhere. The stock was held by a very limited number of persons and the business was transacted harmoniously, two members of the Matthiessen family and two members of the Hegeler family being elected to the board of directors each year. After the death of Edward C. Hegeler 211 shares of the Hegeler stock was held by

Mrs. Carus as trustee under the will of her father, one share was held by Mrs. Carus in her own right, and one share by C. B. Lihme, a son-in-law of Edward C. Hegeler. Mrs. Carus was a director and president of the company, and Lihme was the other director representing the Hegeler interests. This was the situation on December 18, 1913. On December 17, 1913, appellant and others instituted *quo warranto* proceedings against Lihme to contest his right to hold the office of director in the company, and summons in that case was served on him either that evening or the next morning. Mrs. Carus and Lihme went to the office of the company in LaSalle about ten o'clock the morning of December 18, 1913. They found there present all the Matthiessen stockholders, either in person or by proxy. Lihme was much excited over the action which had been instituted against him, and he at once demanded of appellant that no election be held and no business be transacted at that time. Some of the witnesses testify that he demanded that the meeting adjourn until some time in the future, but all the testimony is to the effect that he demanded that no action be taken that day. While Lihme was engaged in making his demands a member of the Matthiessen family moved that appellant be made the chairman of the meeting, and this motion was put and declared carried. Mrs. Carus was in the same way selected as secretary of the meeting. About the time the vote was being taken on Mrs. Carus as secretary she and Lihme withdrew from the room. Mrs. Carus said nothing whatever while she was in the room, and neither she nor Lihme voted on the two motions put while they were present. It is contended that as Lihme continued to demand that the meeting adjourn after appellant had been selected as chairman and had taken charge of the meeting, he thus participated to the extent that he is bound by the action of the meeting. Lihme did nothing but protest against the taking of any action or the transaction of any business at that time; but be the effect of his actions what it may, Mrs. Carus said noth-

ing and did nothing that could be construed as consenting to the holding of the meeting. Unless the provisions of the by-laws constituted sufficient notice of the annual meeting, or the physical presence, alone, of Mrs. Carus constituted a waiver of the statutory notice, the meeting was not a legal one and any election held thereat would be invalid. After Mrs. Carus and Lihme had departed the election was held and appellant was elected as one of the directors for the ensuing year.

While the trial court held as a proposition of law that a by-law of a corporation which names a day, but not the hour, for the holding of the annual meeting is insufficient notice to the stockholders of the time of holding the meeting, it took the view that no stockholder can urge the invalidity of such meeting for want of notice unless he has been injured or deprived of some substantial right by lack of notice; that where all the stockholders are present on the day and at the place fixed in the by-laws and at an hour at which for over twenty years it was customary to hold the annual meeting, and where each stockholder knew that the annual election for directors was then about to take place, in law each stockholder had the right and opportunity to participate in the meeting and was not injured by lack of notice or deprived of any substantial right and cannot urge the invalidity of the meeting on the ground of lack of notice. The court properly held that the by-laws did not constitute notice to the stockholders of the holding of the annual meeting for the election of directors. Section 6 of the act under which this company was incorporated provides that this meeting shall be held at such time and place as the board of directors may designate, and expressly requires written notice to be given the stockholders each year. Had the by-laws provided the hour at which the annual meeting should be held on each December 18 it would have amounted to no more than the designation of the time and place of the meeting by the board and would not take the place of the



notice required by the statute. That notice is indispensable unless it is waived by all the stockholders, either expressly or by consenting to or participating in the meeting.

Did Lihme waive notice by demanding that no business be transacted, and by demanding a pledge of the chairman, after he had been selected, that the meeting do nothing but adjourn, or did Lihme and Mrs. Carus waive notice by their mere presence at the meeting? By nothing which he did or said did Lihme recognize the right of the meeting to organize or to transact business. His effort to secure a pledge from appellant, even after he had been selected by his faction as chairman, that the meeting do nothing but adjourn, amounted to no more than an offer to submit to the jurisdiction of the meeting provided no business whatever should be transacted. His offer was not accepted and he withdrew, protesting against the holding of the meeting.

This court has never been called upon to decide whether the mere presence of a stockholder at an annual meeting for the election of directors, with full opportunity to participate, is alone sufficient to constitute a waiver of notice and deprive him of the right to rely upon lack of notice. The text in 10 Cyc. 326, that where notice is required by statute the meeting cannot be legally held unless the notice be explicitly given in respect of the day, hour and place or the stockholders are all present and consenting, but if a single member having the right to be present and vote is not duly notified and is absent, or being present refuses to consent to the holding of the meeting, its proceedings will be void, states the correct rule and is supported by authority. This question arose in *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36, and the Appellate Court for the Second District, in an opinion written by a present member of this court, held that every stockholder had a right to be present at the annual meeting for the election of directors, and it could not be legally held until after notice of the time and place had been given in an authentic and legal mode, unless all stockholders

were present and consenting, in person or by proxy. That holding is correct, and, as applied to the facts in this case, neither Mrs. Carus nor Lihme having consented to the holding of the meeting or participated in it in any way, the meeting of December 18, 1913, was not legally held and appellant has no valid title to the office of director of the company by virtue of any action taken at that meeting.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. PASQUALE FORTE *et al.* Plaintiffs in Error.

*Opinion filed October 27, 1915.*

1. CRIMINAL LAW—*right of self-defense extends to the killing, by a brother, of assailant of his sister.* The right of self-defense extends to the killing, by a brother, of an assailant of his sister, where the circumstances are such that the sister would have been justified in killing her assailant in her own defense.

2. SAME—*when it is error to give instructions stating correct rules of law.* Giving instructions stating correct abstract rules of law is not error if they can be fairly applied to the facts in the case, but it is error to give such instructions if they are liable, under the facts, to mislead the jury.

3. SAME—*when right of self-defense revives.* Even though a young girl, by firing a revolver at her tormentor across the street, may be regarded as being the assailant, yet if she abandons her purpose and flees for safety toward her home but is overtaken by her tormentor, who throws her down and proceeds to choke her, then her right to exercise self-defense revives, and if her brother finds her in apparent danger of losing her life or sustaining great bodily injury at the hands of her tormentor, he has the same right to defend his sister that he would have had had her tormentor been the original assailant.

WRIT OF ERROR to the Criminal Court of Cook county;  
the Hon. CHARLES A. McDONALD, Judge, presiding.

FRANCIS BORRELLI, for plaintiffs in error.

P. J. LUCEY, Attorney General, MACLAY HOYNE, State's Attorney, and GEORGE P. RAMSEY, (STEPHEN A. MALATO, of counsel,) for the People.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

The plaintiffs in error, Pasquale Forte and Anna Forte, were indicted with their mother, Pasqualina Forte, for the murder of Anthony Morasco on April 29, 1913, in the city of Chicago. Upon a trial in the criminal court of Cook county the jury found the defendant Pasquale Forte guilty of murder and his punishment was fixed at imprisonment in the penitentiary fourteen years. The defendant Anna Forte was found guilty of manslaughter, and the jury fixed her punishment at imprisonment in the penitentiary but found that she was within the ages of ten and twenty-one years and about the age of seventeen years. Motions for a new trial were made and were overruled as to Pasquale Forte and Anna Forte and the motion as to Pasqualina Forte was continued. A motion in arrest of judgment was made and overruled, and the court sentenced Pasquale Forte to imprisonment in the penitentiary at Joliet for fourteen years and sentenced Anna Forte to a term of imprisonment in the State Home for Female Offenders at Geneva.

There had been trouble between the defendants and Morasco before the fatal encounter. In August, 1912, the defendant Anna Forte, who was fifteen years old, became engaged to be married to Morasco, who was about twenty-five years of age. Because of alleged improper conduct of Morasco toward her and because of his coming to the house in an intoxicated condition she broke off the engagement in February, 1913. During the engagement he had deposited small sums of money, amounting to \$79, with her father, and that money was returned to him and he was advised to deposit it in the Schiavone Bank. Morasco was angry at the breaking of the engagement and came to the house

at 930 Hope street, in Chicago, where Anna lived with her family, and was insulting and made threats that if he saw Anna he would cut her face. The father met Morasco at the house of a neighbor by request, and Morasco gave him some things he said he had bought for Anna and wanted him to pay back the money they had cost, and the father gave him the money, which was about \$1.50. About three weeks before the homicide Morasco was in front of the Forte home, singing what witnesses called dirty songs, of such a character that a neighbor closed his window. After that, Anna, who was employed in a beads factory, was going to her work one morning when Morasco came after her with a razor in his hand. She ran away from him into a woman's store on Taylor street and then went home and told her people what had occurred and did not go to work. She and her mother, Pasqualina Forte, went to the house of an Italian police officer and made complaint about Morasco's annoying her and asked the officer to arrest him. Nothing was done, however, and on April 24 Pasqualina Forte, with Anna and the younger sister, Caroline, were going along the street toward Blue Island avenue when Morasco ran after them, gave the mother, who was then far advanced in a delicate condition, three or four blows and knocked her down, kicked the little girl, Caroline, on the knee, and knocked Anna down and made her nose bleed. The next day the mother, Pasqualina Forte, went to the Maxwell police station of the municipal court and made a complaint, under oath, for the assault upon her and a warrant was issued for Morasco's arrest. The return of the officer on the warrant was dated April 29 but the arrest was on the evening of the 28th, and on that evening he was in front of the Forte home making a noise and talking dirty. When arrested he gave bail in the sum of \$50, and the homicide occurred the next morning.

The homicide was witnessed by six disinterested persons, three of whom testified on the part of the People and

three testified on behalf of the defendants, and the defendants were also witnesses. There was no material difference in the accounts given by the different witnesses of what occurred and their testimony corresponded with evidence given at the coroner's inquest which was introduced on the trial. It was about 6:30 o'clock in the morning of April 29 when Pasqualina Forte came out of the house at 930 Hope street to get a bottle of milk for breakfast. Morasco was standing directly across the street, in front of 931 Hope street, looking at the house, and she asked him what he was looking at. He said he was looking at her, and she asked him why he did not go home and go about his business. Morasco said that she had him arrested the night before and he got out on \$50 bond, and before he would go away she would have to give him \$1000 or he would make them sell their house for rags. He came across the street to the north side and stood under the porch of the Forte house when he said that, and she said she did not owe him any money and he should go away about his business and leave them alone. She then went inside of the house and came out with a revolver, and Morasco was then across the street southwest of her. She fired four or five shots, and but one bullet, which struck a bystander but apparently did no harm, was accounted for. When the firing commenced Morasco ran behind a wagon standing in the street. Anna Forte was in the house, and hearing the shooting took a little revolver and ran out on the street and fired one shot. Morasco started toward her, calling her a sow or an epithet much worse, and she ran toward the house, screaming and crying for help. Morasco caught up with Anna when she reached the sidewalk or was part way up the steps, and caught her by the hair and knocked her head against the house two or three times and then threw her down on the sidewalk on her face and choked her. He had his knees on her back and his hands around her throat and was choking her and bumping her on the

sidewalk. The mother, Pasqualina Forte, attempted to rescue Anna and was striking Morasco with the butt end of her revolver. She was a small woman, four feet ten inches in height, and Morasco was about five feet eight inches and weighed about 160 pounds. The younger daughter began screaming and calling for her brother, the defendant Pasquale Forte. He was in the house and had been operated on for hernia and had not entirely recovered. He was awakened by the screaming of the little girl, who called him to hurry,—that Tony was killing Anna. He came out, dressed in his undershirt, trousers and stockings, and had a hatchet or hand-ax in his hand. As he came out Morasco had his knees on Anna's back and his hands around her neck, and the mother was either on top of Morasco, or, as one witness thought, one of her legs was under him and she was trying to pull him off. Pasquale pushed his mother out of the way and struck Morasco four times in immediate succession,—once on the hip and the other blows on the head,—causing his death. Anna's elbows were both skinned in places covering each elbow two or three inches in diameter, and there were bruises on each forearm, a scratch on her neck and a bruise on one side of her neck, and the comb that had been in her hair and the beads that had been around her neck were scattered over the sidewalk.

By what process of reasoning the jury reached the verdict returned it is difficult to understand. It could not have been by the application of correct rules of law to the evidence. It is true that when Anna heard the shooting and ran out of the house she fired a shot from her revolver, but in view of what had occurred she was necessarily in a state of great excitement. Morasco had followed her with a razor after having threatened to cut her face, and only a few days before her mother had been assaulted and knocked down by him and she and her little sister had also been assaulted. She did not make a deliberate assault upon Morasco, and when he started across the street toward

her, calling her a vile name, she ran away, frightened and screaming. While she was trying to escape Morasco pursued her, caught her by the hair, knocked her head against the house, threw her down on the sidewalk, skinned her elbows and bruised and choked her. She was only trying to escape from him and to save her own life or save herself from great bodily harm, and had nothing to do with the killing, either by word or act. Morasco was killed by Pasquale Forte, who was called to rescue his sister Anna by the screaming of the little girl, Caroline, who shouted that Tony was killing Anna. He came out and found Morasco on his sister's back on the sidewalk, choking her, and his mother trying to save his sister. No one can doubt that the situation presented to him was that his sister was in imminent danger of losing her life or suffering great bodily injury, or that there was apparent necessity of killing Morasco in order to save her from such death or bodily harm. The killing was done in good faith under an honest and reasonable belief that it was necessary to prevent Morasco's apparent purpose, and as Anna was helpless, lying on her face under Morasco and being choked by him, she could not have appeared to Pasquale as an aggressor. The right of self-defense extends to the killing, by a brother, of an assailant of his sister,—at least provided the circumstances are such that the sister would have been justified or excused in killing her assailant in her own defense,—and that Anna would have been so justified is free from any sort of doubt. Whatever limitations there may be of the right of self-defense when exercised by one member of a family for the protection of another, the act of Pasquale Forte was within such limitations. If Pasquale Forte could do no more than his sister might lawfully have done for herself, he was justified, under the doctrine of self-defense, in what he did.

Perhaps the jury were misled by the instructions. The object of instructions is to give to the jury rules of law

applicable to the evidence so that the jury may apply such rules to the facts of the case. Having determined the facts from the evidence, instructions are designed to enable the jury to apply proper legal principles so as to reach a verdict in accordance with the law and the evidence, and it is not proper for the court to expound even correct rules of law in the form of instructions which the jury cannot make use of in deciding the case. (*City of Taylorville v. Stafford*, 196 Ill. 288.) The court gave nineteen instructions at the instance of the People, most of them ready-made and abstract in form, to fit every case where one of the parties to a conflict kills the other. While it is not error to give such abstract rules of law if they can fairly be applied to the facts of the case, it is error to give such instructions which are liable to mislead the jury. An example of the instructions given is numbered 14, as follows:

"The court instructs the jury that it is the law in this State that if a person kill another in self-defense it must appear that the danger was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm the killing of the other was apparently absolutely necessary; and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given."

The instruction did not apply to Anna Forte, who was in the dangerous situation contemplated by the instruction, for she did not kill Morasco or participate in the killing in any way. It had no relation to Pasquale Forte, who did the killing, because there was no danger to him and it could not have appeared to him that it was absolutely necessary to kill Morasco in order to save his own life or to prevent his receiving great bodily harm. If the jury took that and similar instructions as a literal guide, the defendant who killed Morasco was not justified in doing it. Taking the evidence in the most favorable light for the People,



if it can be fairly assumed that Anna was an assailant when she ran out of the house and fired the shot, there was no room for doubt that she abandoned the contest when she took flight to her own home and was pursued and attacked by Morasco.

The court gave an instruction, numbered 13, at the request of the defendants, which was fairly applicable to the evidence, as follows:

"The jury are instructed that although you may believe, from the evidence, that the defendant Anna Forte commenced the fight in question and made the first attack upon the deceased, still if the jury further believe, from the evidence, that the defendant Anna Forte afterwards, and before the fatal blows were struck by the defendant Pasquale Forte, in good faith abandoned the fight, then the right of the deceased to employ force against the defendant Anna Forte ceased, and if the deceased did not then desist from attempting to use violence towards the defendant Anna Forte, then the defendant's right to defend herself revived; and if the defendant Pasquale Forte then found his sister Anna Forte in apparent danger of losing her life or of sustaining great bodily injury at the hands of the deceased, he would have the same right to defend Anna Forte that he would have had if Anna Forte had not originally commenced the conflict."

If the jury concluded that Anna Forte commenced the fight and made the first attack upon Morasco, yet there could be no doubt that she abandoned any intention of continuing it when she ran away from Morasco and sought safety in her own home. The verdict was in direct conflict with this instruction as well as with the evidence of the case.

The judgment is reversed and the cause is remanded.

*Reversed and remanded.*

THE PEOPLE *ex rel.* Charles A. Kellogg, County Collector,  
Appellee, *vs.* THE CHICAGO, ROCK ISLAND AND PACIFIC  
RAILWAY COMPANY, Appellant.

*Opinion filed October 27, 1915.*

1. TAXES—*road and bridge tax must be certified on first Tuesday in September.* Section 56 of the Roads and Bridges law of 1913, requiring the highway commissioners to meet on the first Tuesday in September and determine and certify the amount necessary to be raised for road and bridge purposes, is mandatory, and the certificate must be made on that day.

2. SAME—*what cannot be considered an amendment of certificate.* A certificate made by highway commissioners three days after the first Tuesday in September cannot be considered as an amendment of a previous certificate made in compliance with sections 13 and 14 of the Roads and Bridges law as it existed prior to the new law of 1913, and neither certificate is authority for extending the tax.

3. SAME—*under the act of 1913 the original certificates of levy must be filed with county clerk.* Under the Roads and Bridges law of 1913 the original certificates of levy of road and bridge taxes must be filed with the county clerk, and no valid tax can be extended by him upon a copy of the certificate of levy the original of which is filed with the town clerk, as was the practice under the old law.

4. SAME—*objections are properly preserved if copied in the record.* Objections to an application for judgment and order of sale for delinquent taxes are properly preserved if copied in full in the record, and it is not essential that they be preserved by a bill of exceptions.

5. SAME—*when right of the objector to object to tax cannot be questioned.* If no question is raised in the county court as to the right of the objecting railroad company to object to taxes charged against it on a certain line of railway not having the same name as that of the objecting company, it cannot be urged on appeal that the objector should have made some proof that it owned or controlled the line on which the taxes were levied.

APPEAL from the County Court of Henry county; the  
Hon. LEONARD E. TELLEEN, Judge, presiding.

HAND & MELIN, and A. B. ENOCH, for appellant.

P. J. LUCEY, Attorney General, and NELS F. ANDERSON, State's Attorney, for appellee.

MR. CHIEF JUSTICE FARMER delivered the opinion of the court :

This is an appeal from a judgment of the county court of Henry county overruling objections of appellants to the application of appellee for judgment and order of sale of appellant's property for delinquent road and bridge taxes in the townships of Galva, Weller, Cambridge, Andover, Alba, Annawan, Atkinson and Osco, in said county, for the year 1914.

The objections to the judgment for taxes are based on the claim that the levy was not made in compliance with the requirements of the Road and Bridge law which went into effect July 1, 1913. Section 56 of that act requires that the commissioners of highways hold a regular meeting on the first Tuesday in September to determine and certify to the board of supervisors or board of county commissioners the amount necessary to be raised by taxation for the construction, maintenance and repair of roads and bridges, not exceeding sixty-one cents on each \$100, such certificate to be filed in the office of the county clerk, who shall present it to the county board. The first Tuesday of September, 1913, was the second day of the month. The certificate of the commissioners of highways of Osco township upon which the road and bridge tax in that township was extended by the county clerk was dated September 5 and filed in the county clerk's office September 6. We have held that the requirement of section 56 of the Road and Bridge act of 1913 that the commissioners meet the first Tuesday in September and determine and certify the amount necessary to be raised for road and bridge purposes is mandatory and must be complied with to make the levy valid. (*People v. Toledo, St. Louis and Western Railroad Co.* 266 Ill. 112; *Same v. Same*, 267 id. 142.) It was

proved on the hearing of the objections to the road and bridge tax in Osco township, by the record kept by the town clerk, that the commissioners of highways and the board of town auditors met September 2, 1913, which was the first Tuesday, and levied a road and bridge tax of thirty-six cents on each \$100, and an additional twenty-five cents on each \$100 for putting in concrete bridges. A certificate of the commissioners of highways and of the board of town auditors was made and sent to the county clerk, who refused to receive and file it. The certificate was not made at the time required by the act of 1913 but was made in compliance with the provisions of sections 13 and 14 of the old act. After it was returned to the town clerk the highway commissioners met September 5 and made the certificate upon which the tax was extended, and which, in form, complied with the law in force at the time it was made. No levy could, of course, be made under the old act after the 1913 act went into effect. *People v. Chicago, Burlington and Quincy Railroad Co.* 266 Ill. 63; *People v. Illinois Central Railroad Co.* 265 id. 429; *People v. Toledo, St. Louis and Western Railroad Co.* 249 id. 175.

It is insisted by appellee that no particular form is prescribed by section 56 of the act of 1913; that the commissioners did meet at the time required and certified to a levy of the tax, and that the certificate made at the subsequent meeting held September 5 should be considered and treated as an amendment of the former levy, and reference is made to section 191 of the Revenue act as supporting that contention. That section governs the proceeding in the county court upon application for judgment, and authorizes the court, in its discretion, to permit any irregularity or informality connected with the assessment or levy of taxes to be corrected, supplied and made to conform to the law. We think it has no application to the question here involved, and that the extension of the tax upon a certificate of levy made after the time fixed by law for

making it was invalid. The county clerk testified that the tax was extended upon the certificate of the commissioners made September 5.

In the other seven townships the commissioners of highways met on the first Tuesday of September, 1913, and made certificates of levy for the road and bridge tax in the respective townships in conformity with the requirements of sections 13 and 14 of the old act. They did not file the certificates of levy with the county clerk but filed them with the town clerks of the respective townships, and they filed certified copies of them with the county clerk. It is contended by appellee that it does not appear from the record that the original certificates were not filed with the county clerk and that certified copies of them were filed instead of the originals. That question might be left in some doubt from the oral testimony, alone, of the town clerks, but that testimony supplemented by their certificates to the certificate of levy filed with the county clerk we think clearly shows the originals were not filed with the county clerk. The town clerks certify that the certificate is a complete copy of the original certificate of levy delivered to the clerk by the commissioners of highways "and now remaining on file in my office." It seems to us no reasonable conclusion can be drawn other than that the certificates were filed with the town clerks, who filed certified copies with the county clerk. Section 56 of the act of 1913 requires the certificates of levy to be filed in the office of the county clerk, and no valid tax can be extended by that officer upon a copy filed with him of the certificate of levy. *People v. Cairo, Vincennes and Chicago Railway Co.* 265 Ill. 634; *Litchfield and Madison Railway Co. v. People*, 225 id. 301; *People v. Kankakee and Southwestern Railroad Co.* 218 id. 588.

It is also contended by appellee that the objections of appellant are not properly before the court because they were not made a part of the record by the bill of excep-

tions. They are copied in full by the clerk in the common law record, but appellee insists they were not pleadings, and could only be made a part of the record by incorporating them in the bill of exceptions. It is true, the common law form of pleading does not obtain in cases of this character, but it has been held that the delinquent list filed by the collector is in the nature of a pleading and serves the office of a declaration. (*Wiggins Ferry Co. v. People*, 101 Ill. 446.) The objections of the property owner serve the purpose of a plea by him, and we think the objections are properly preserved as a part of the record without being incorporated in the bill of exceptions.

The taxes appear from the record to have been extended against the Rock Island and Peoria line in some of the townships, and appellee insists it was incumbent upon appellant to show, by proof, that it either owned or controlled that line or that it had such an interest as to authorize it to object to the validity of the tax. The objections are to taxes charged against appellant on the Rock Island and Peoria line. No question was raised in the county court as to the interest of appellant or its right to object to the tax but the objections were heard upon their merits. It is too late now to raise that question for the first time. *People v. Chicago and Eastern Illinois Railroad Co.* 214 Ill. 190; *Cincinnati, Indianapolis and Western Railway Co. v. People*, 205 id. 538.

We are of opinion the county court erred in overruling the objections of appellant, and the judgment will be reversed and the cause remanded, with directions to sustain the objections.

*Reversed and remanded, with directions.*

THE PEOPLE *ex rel.* James J. Brady, Auditor, Appellee, *vs.*  
 THE LASALLE STREET TRUST AND SAVINGS BANK.—  
 (WILLIAM L. ELLWOOD *et al.* Appellants.)

*Opinion filed October 27, 1915.*

1. CONSTITUTIONAL LAW—*amendments need not be read on three different days.* Under the constitution of 1870 amendments to bills need not be read on three different days.

2. SAME—*amendments do not destroy identity of act.* Amendments, whether important or unimportant, whether to the title or body of the act, if they are germane to the act cannot be regarded as destroying its identity.

3. SAME—*what is sufficient to show a bill, with its amendments, was printed.* The journal of the senate showing that a certain bill and its amendments was voted to be printed, and the record of the next day's journal that the bill, "having been printed, was taken up and read at large a third time, and the question being, Shall this bill pass, together with the senate amendments thereto? it was decided in the affirmative," are sufficient to show that the bill, with its amendments, was printed before a vote was taken on its final passage.

4. SAME—*object of provision requiring bills to be read three different days.* The object of the provision of the constitution requiring acts to be read on three different days is to give time for deliberation but not to deprive of the opportunity of amendment, which is the result of deliberation.

5. SAME—*when one invalid section will not render whole act unconstitutional.* Where one section of an act is not passed in the manner prescribed by the constitution the remaining sections will still be good unless the valid part and the invalid part are so connected and dependent upon each other that it cannot be presumed that the legislature would have passed the one without the other; and this rule is the same whether the void section is so because of its conflict with some constitutional limitation or because of a failure to observe some constitutional requirement in its enactment.

6. SAME—*part of section 10 of Banking act of 1907 is invalid.* That portion of section 10 of the Banking act of 1907 (Laws of 1907, p. 54,) which purports to fix the amount which any one person, firm or corporation may owe to any bank is invalid, in that it was introduced into the act by a conference committee amendment which does not appear to have been printed, but the invalidity of the amendment does not vitiate the remainder of the act.

7. ELECTIONS—*when substance of a proposition need not be printed on the ballot.* Where an act upon which a referendum vote by the people is required has been published in the volume of laws of the session of the General Assembly before the election is held, it is not necessary that its substance be printed on the ballot but it is sufficient if its subject is clearly given.

8. SAME—*when proposition need not be submitted in the form prescribed by section 16 of the Ballot law.* Where an act requiring a referendum vote provides the form in which the question shall be submitted to a vote, that form must be followed in the ballot and not the form prescribed by section 16 of the Ballot law.

9. SAME—*construction of referendum provision of Banking act of 1907.* The language of the referendum provision of the Banking act of 1907, (Laws of 1907, p. 56,) that the ballots shall be prepared, printed and distributed in accordance with the Ballot law, does not contemplate a compliance with section 16 of the Ballot law, but merely means that ballots in the form prescribed by the Banking act itself shall be prepared and distributed in accordance with the provisions of the Ballot law.

10. SAME—*referendum provision of the Banking act of 1907 requires both alternatives upon the ballot.* The referendum provision of the act of 1907 for the amendment of sections 4, 5, 10 and 11 of the general Banking law (Laws of 1907, p. 56,) requires that both alternatives shall appear upon the ballot for the voter's choice.

11. BANKS—*stockholders of record are proper parties to bill for receiver.* Section 6 of the general Banking law, which provides for a public record of the stockholders of a banking corporation, and section 11 of the same law, which provides that a suit for dissolution shall be against the corporation and its stockholders, must be construed together to afford a practical remedy, if possible; and in case a transfer of stock is not recorded as required by law, the stockholder in whose name the stock stands when the suit for dissolution is brought is properly made a party, whatever, if any, may be his liability.

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

MOSES, ROSENTHAL & KENNEDY, LIVINGSTON, BACH & LIVINGSTON, RYAN & CONDON, KNAPP & CAMPBELL, OSCAR M. TORRISON, and WALTER W. ROSS, (JOHN R. COCHRAN, of counsel,) for appellants.



P. J. LUCEY, Attorney General, and HIRAM T. GILBERT, Special Counsel, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The People of the State of Illinois, on the relation of the Auditor of Public Accounts, filed a bill in the circuit court of Cook county against the LaSalle Street Trust and Savings Bank and its stockholders for the appointment of a receiver, for the dissolution of the corporation, and for other relief. The bill was afterwards amended, answers were filed, a hearing was had and a decree rendered granting the relief prayed for, from which some of the defendants have appealed.

The bill was filed under section 11 of the "Act concerning corporations with banking powers," as amended by the act of June 3, 1907. (Hurd's Stat. 1913, p. 120.) It is contended that the decree is erroneous because thirty days' notice to have the impairment of the capital stock made good was not given to the president, as required by section 11 before its amendment in 1907. (*People v. Milwaukee Avenue State Bank*, 230 Ill. 505.) This contention is based upon the further contention that the amendment of 1907 was not constitutionally passed by the legislature nor constitutionally adopted by the people. The claim is made that the bill does not appear to have been read on three different days in each house and that all amendments to the bill were not printed before the vote was taken on its final passage, and the house and senate journals were introduced in evidence in support of this claim.

It appears from the house journal that the bill originated as House Bill No. 522, and was called up in the order of first reading on March 28, 1907, and read at large the first time and ordered to a second reading. On April 19 it was called up by unanimous consent, and Mr. McGoorty presented an amendment and asked that it be printed for the information of the house, and it was so ordered. On May 1

the bill was again called up, and the journal recites "that having heretofore been read at large a second time on April 19, 1907, it was again taken up." Two amendments were offered,—one to the title, the other striking out all after the enacting clause and inserting in lieu thereof four sections amending sections 4, 5, 10 and 11 of the original act. The amendments were both adopted and it was ordered that the bill as amended be engrossed for a third reading. On May 7 the bill, having been engrossed and amendments printed, was taken up, read a third time and passed. On the same day the passage of the bill in the house was reported to the senate and it was taken up and read at large a first time and referred to a committee. On May 9 the bill having the same number, House Bill No. 522, and the same title; was reported back with amendments and was taken up and read at large the second time, together with the amendments, and ordered to a third reading. On May 10 the bill was taken up and read at large a third time and passed. The secretary was instructed to inform the house of representatives of the passage of the bill and ask its concurrence in the amendments. This was done, and the house refused to concur in the amendments. Thereupon the senate refused to recede from its amendments, appointed a committee of conference and asked for the appointment of a similar committee by the house. The house appointed such committee, and a report was made to the two houses recommending that the house of representatives recede from its action in refusing to concur with the senate as to amendments Nos. 1, 2, 3 and 5 and that the senate recede from its amendment No. 4, and a substitute was recommended in lieu of amendment No. 4. This report was adopted by both houses.

The question is one of identity of the bill. The appellants insist that it appears from the house journal that the bill as finally passed by the house was never read but once, and that upon the third reading in the house. They refer to *Illinois Central Railroad Co. v. People*, 143 Ill. 434,

as sustaining their position that changes made in a bill in matters of substance in its progress through the houses of the General Assembly will render the act void unless the bill is read in each house three times after the changes have been made. This position is not in accordance with the law of this State and the case cited does not sustain it. Under our constitution, amendments to bills need not be read on three different days. (*People v. Wallace*, 70 Ill. 680; *People v. Brady*, 262 id. 578.) This bill was given the number 522 when it was first introduced in the house. It retained that number throughout its course in both houses. It purported to amend the act concerning corporations with banking powers, approved June 16, 1887. As introduced its title was, "An act to amend sections 10 and 11" of that act, etc. By the amendment the title was made to read, "A bill for an act to amend sections 4, 5, 10 and 11" of that act, etc. The amendments made in the body of the act in the passage of the bill through the two houses were material and substantial, but the act did not thereby lose its identity as House Bill No. 522 for the amendment of the Banking act. The amendments were all germane to the act and such as might properly be introduced. Amendments, whether important or unimportant, whether to the title or body of the act, if they are germane to the act cannot be regarded as destroying its identity. The object of the provision requiring acts to be read on three different days is to give time for deliberation but not to deprive of the opportunity of amendment, which is the result of deliberation. The journals show a compliance with the requirement that every bill shall be read at large in each house on three different days.

It is further objected that the constitutional requirement that every bill, with all the amendments thereto, shall be printed before the vote is taken on its final passage is not shown to have been complied with. In regard to the senate amendments, the senate journal shows that on May 9 "the bill was taken up and read at large the second time, to-

gether with the following amendments thereto reported this day,"—then follow five amendments; and "the question then being, Shall the report of and amendments reported from said committee be adopted? it was decided in the affirmative; and the question being, Shall the bill be ordered to a third reading and the amendments printed? it was decided in the affirmative." On the next day the senate journal shows House Bill No. 522, "having been printed was taken up and read at large a third time, and the question being, Shall this bill pass, together with the senate amendments thereto? it was decided in the affirmative." Such a record as this was held in *People v. McWeeney*, 259 Ill. 161, to show that the bill, with the amendments, was printed before the vote was taken on the final passage in the senate.

There is nothing in the journals to show that the report of the conference committee was printed. That report substituted an amendment in lieu of senate amendment No. 4, which amended section 10 of the Banking act. Section 10 limited the amount of the liabilities to any association which any person, corporation or firm might incur, and as the bill passed the house the limit was one-tenth of the capital stock and surplus of the bank. Senate amendment 4 changed this to one-fifth, the conference committee amendment to fifteen per cent. The failure to print the conference committee's amendment did not render the whole act void but only invalidated the amendment. (*People v. Brady, supra.*) The fact that one section of an act of the legislature was not passed in the manner prescribed by the constitution does not, alone, have the effect of destroying the validity of the remaining sections. The rule is the same whether the void section is so because of its conflict with some constitutional limitation or because of a failure to observe some constitutional requirement in its enactment. (*People v. Olsen*, 222 Ill. 117.) In either case the act will not be declared void because a part of it was unconstitutional, unless the valid part and the invalid part are so connected and dependent upon

each other that it cannot be presumed that the legislature would have passed the one without the other. (*Noel v. People*, 187 Ill. 587; *Sheldon v. Hoyne*, 261 id. 222.) The conference committee's amendment which was not printed merely increased the limit of the liability which any one person, corporation or firm might incur to the banking association from ten to fifteen per cent, and it cannot be supposed that the legislature would have regarded the change as so important that they would not have passed the bill without this change.

Section 5 of article 11 of the constitution provides that no act of the General Assembly authorizing or creating corporations or associations with banking powers shall go into effect until submitted to a vote of the people at the general election succeeding its passage and until approved by a majority of the votes cast at such election. It is insisted that the amendment of 1907 was not submitted to the people and voted on in accordance with this section.

The amendment of 1907 provided: "This act shall be submitted to a vote of the people for their ratification, according to article 11, section 5, of the constitution of this State, at the next general election, and the question shall be, 'For the amendment of sections 4, 5, 10 and 11 of the general Banking law' or, 'Against the amendment of sections 4, 5, 10 and 11 of the general Banking law,' and it shall be the duty of the officials now required by law to print and distribute ballots for use in elections to prepare and distribute ballots for such submission, such ballots to be prepared, printed and distributed in accordance with the provisions of an act entitled, 'An act to provide for the printing and distribution of ballots at public expense,' " etc.

Section 16 of the act referred to, provides as follows: "Whenever a constitutional amendment or other public measure is proposed to be voted upon by the people, the substance of such amendment or other public measure shall be clearly indicated on a separate ballot, and two spaces shall be

left upon the right-hand margin thereof, one for the votes favoring the amendment or public measure, to be designated by the word 'Yes,' and one for votes opposing the amendment or measure, to be designated by the word 'No,' as in the form herein given :

Proposed amendment to the constitution (or other measure)	YES	X
(Here print the substance of the amendment or other measure)	No	

The form of ballot used in the election was as follows :

PROPOSED AMENDMENT TO GENERAL BANKING LAW. For the amendment of Sections 4, 5, 10 and 11 of the General Banking Law.	
Against the amendment of Sections 4, 5, 10 and 11 of the General Banking Law.	

It is contended that the constitution required at least an accurate statement of the substance of that which was to become the law to be printed on the ballots so that the voter would know what he was voting for or against. The act itself had been published in the volume of laws of the session more than a year before the election was held. The constitution contained no direction as to how the knowledge of the proposed law should be brought to the attention of the voter. This was left to the discretion of the legislature. It was not necessary that the proposed law, or the substance of it, should be printed on the ballot. The legislature might take such other means as seemed reasonable to inform the voters as to the proposed change in the law. We cannot say that the publication of the act, together with the other acts of the legislature, was not sufficient.

It is contended by the appellants that the amendment should have been submitted in accordance with the requirements of section 16 of the Ballot law, which has been quoted. The language of the act providing for the submission to a vote does not mention section 16 of the law. The requirement is, that the officers who are now required by law to print and distribute ballots for use in elections shall prepare and distribute ballots for such submission, and that such ballots shall be prepared, printed and distributed in accordance with the provisions of the Ballot law. The amendment itself provided the form in which the question should be submitted to a vote, and that form was not the form provided by section 16 of the Ballot law. The reference to preparing, printing and distributing of ballots in accordance with the Ballot law could have meant only preparing, printing and distributing ballots in the form previously prescribed by the act itself. The General Assembly not being limited by the constitution in that particular, had the power to provide the manner in which the amendment should be submitted to a vote, and having prescribed the form of ballot which should be used, that form must be followed. *Harvey v. County of Cook*, 221 Ill. 76; *Swigart v. City of Chicago*, 223 id. 371; *People v. Myers*, 256 id. 529.

It is argued that the section providing for the submission to a vote of the people requires that the question shall be for the amendment of sections 4, 5, 10 and 11 of the general Banking law or against the amendment of sections 4, 5, 10 and 11 of the general Banking law, and that only one proposition, and not both, should be printed upon the ballots. This is manifestly an erroneous construction of the section. It was not intended to have one of the alternatives printed on the ballot or the other, in accordance with the discretion of the different county clerks who might prepare the ballot, but that both alternatives should appear upon the ballot for the voter's choice.

It is also insisted that if section 2 of the amendatory act does not require the act to be submitted to a vote, as required by the Ballot law, it is contrary to that clause of section 22 of article 4 of the constitution which prohibits special legislation where a general law can be made applicable; that as this is a special law applicable to this act, alone, a general law should have been made applicable, and that section 16 of the Ballot law is a general law which was applicable to the case. This general provision of the constitution is addressed to the judgment and discretion of the legislature, which are not reviewable by the courts. *Owners of Lands v. People*, 113 Ill. 296; *Sanitary District of Chicago v. Ray*, 199 id. 63; *People v. McBride*, 234 id. 146.

The appellants argue that the Auditor cannot bring a suit against the stockholders to enforce a liability to the creditors of the bank. Section 11 of the act provides: "When it shall be ascertained, in the course of the administration of the estate of a bank in the hands of a receiver that the assets of the bank are insufficient to discharge the entire liability of such bank to its creditors, and when the amount of such deficiency is determined, the court may, in its discretion, direct the receiver to proceed to enforce the liability of the stockholders to creditors provided in section 6 of this act; and when so directed, such receiver shall have the power, and it shall be his duty, to take such action, by suit or otherwise, as the court may direct, to enforce such liability for the benefit of the creditors," etc. The decree contained the following clause: "Fourth, that such other and further proceedings may be taken herein and such other and further orders made herein by the court from time to time as the court may find necessary or proper for the administration of the assets of said trust and savings bank and the complete winding up of the affairs of said trust and savings bank, including the enforcement of the liabilities, if any, of the stockholders thereof to the creditors thereof, for all of which purposes the court retains jurisdiction of this cause."



No decree was entered against any stockholder enforcing his liability as a stockholder nor was there any finding of such liability. It may be that no such decree will ever be rendered, and if it should, the person against whom it is rendered may then appeal. The question of the right of the Auditor to enforce the stockholders' liability is not involved in this appeal and therefore we cannot consider it.

It is argued that the court erred in finding that the appellant Paul F. Beich was a stockholder on June 12, 1914. He had been the owner of forty shares of stock, but on December 23, 1913, he had sold his stock and indorsed and delivered the certificate therefor to the purchaser and had not since become the owner of any stock. The transfer was not, however, made on the books of the bank and he still appeared on the books and records of the bank as the owner of forty shares of stock. Section 6 of the Banking law provides: "It is hereby made the duty of the president and cashier, within thirty days after organization, to file in the office of the recorder of deeds of the county in which such bank is located, a certified list of all the original stockholders, giving the number of shares of stock held by each, and thereafter a certificate of all transfers of stock, not later than ten days after such transfer." This section provides for a public record of the stockholders of a banking corporation. Section 11 authorizes the suit against the corporation and its stockholders for the dissolution of the corporation. It ought to be construed to afford a practical remedy, if possible. The purchaser of stock who conceals his identity by his failure to have the stock transferred on the books of the corporation knows that his vendor will be recognized and may be dealt with as the real stockholder. So far as the corporation is concerned, he is the real stockholder until his stock is transferred according to law, or at least until the bank is notified of the transfer. As between the vendor and purchaser, and as to others having notice of the fact, a different question may arise, but so far as the bank and

the people are concerned the registered stockholder may be treated as the real owner of the stock, and the real owner will be bound. We do not decide that the finding will be binding to fix a liability as stockholder upon Beich, but that it is sufficient in a case of this kind to make those who appear upon the records of the corporation to be its stockholders, parties to the suit.

The decree is affirmed.

*Decree affirmed.*

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THE METROPOLITAN LIFE INSURANCE COMPANY, Appellant, vs. WILLIAM I. KINSLEY *et al.* Appellees.

*Opinion filed October 27, 1915.*

**SOLICITORS' FEES**—*court of equity cannot allow solicitor's fee to party filing a bill of interpleader.* Under the rule in Illinois that a court of equity, in exercising its discretion in awarding costs, must confine that discretion to the fees authorized by statute, a court of equity has no power to allow a solicitor's fee to the party filing a bill of interpleader, notwithstanding the court finds that the bill is properly filed. (*Chapin v. Dake*, 57 Ill. 295, followed.)

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding.

HOYNE, O'CONNOR & IRWIN, (CARL J. APPELL, of counsel,) for appellant.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill of interpleader filed in the superior court of Cook county by appellant, setting forth that one Mary Kinsley, recently deceased, held three policies of insurance in said insurance company, in the sums of \$164, \$500 and \$189, respectively, and admitting liability thereon but stating that certain of appellees claimed they were

entitled to the proceeds. On a hearing the court entered a decree, which, as afterwards modified, found that the bill was properly filed and allowed appellant to deposit in court the amount due under said policies of insurance, and certain "mortuary bonuses," but refused to allow \$50 as attorney's fees for the said appellant. From that decree an appeal was prayed to the Appellate Court, the only question raised there being the same as the one raised here. The Appellate Court affirmed the decree of the trial court on that question but granted a certificate of importance, and this appeal was thereupon perfected to this court.

The sole question in this record is whether a court of chancery, under its general equitable powers, can allow solicitor's fees to a party filing a bill of interpleader, as contended by appellant. The general rule has always prevailed in this State that solicitor's fees could not be taxed as costs in chancery suits without statutory authority; that while a court of equity had discretion in awarding costs it must confine that discretion to the fees authorized by statute. (*Constant v. Matteson*, 22 Ill. 546; *Conwell v. McCowan*, 53 id. 363; *Hutchinson v. Hutchinson*, 152 id. 347; *Wilson v. Clayburgh*, 215 id. 506.) In accordance with this rule, before the statute was passed permitting the allowance of solicitor's fees in partition causes, this court repeatedly refused to allow such fees to be charged as costs. (*Strawn v. Strawn*, 46 Ill. 412; *Eimer v. Eimer*, 47 id. 373; *Campbell v. Campbell*, 63 id. 502; see, also, *Kilgour v. Crawford*, 51 Ill. 249, and *Lilly v. Shaw*, 59 id. 72.) Although the rule is to the contrary in many other jurisdictions in this country, (2 Perry on Trusts,—6th ed.—secs. 916-918,) this court refused, under its general chancery powers, following the old English rule, to allow compensation to trustees for their time and trouble in caring for trust estates unless there was a provision for compensation in advance. *Cook v. Gilmore*, 133 Ill. 139; *Buckingham v.*

*Morrison*, 136 id. 437. See, also, as bearing on this question, *Boyd v. McConnell*, 209 Ill. 396, *Roby v. Chicago Title and Trust Co.* 194 id. 228, and *Rieker v. City of Danville*, 204 id. 191.

In *Chapin v. Dake*, 57 Ill. 295, this court refused to allow solicitor's fees on a bill of interpleader, the principle involved being identical with that in the cases heretofore cited. This case has never been overruled. We are well aware that not only in the Federal courts but in certain other jurisdictions in this country a different rule prevails, as is shown by the numerous cases cited by counsel for appellant, but the law has been so long and firmly established in the jurisprudence of this State on this question that it ought not now to be changed by the courts without statutory authority.

Counsel for appellant argue that this case does not differ, in principle, from that class of cases (*Heffron v. Rice*, 149 Ill. 216; *McAnrow v. Martin*, 183 id. 467;) where this court has held that a court of equity, in the absence of statutory authority, could allow a receiver fees for his services. In our judgment, cases of that class are plainly distinguishable from the case before us. The authority of courts of equity to fix the compensation of their own receivers results necessarily from the relation which the receiver sustained to the court, he being its officer or agent, deriving his functions only from that source. (High on Receivers,—3d ed.—sec. 781.) To uphold the contention of appellant on this question would be to overrule, in effect, the conclusions reached in a long line of decisions heretofore cited.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

SARAH JANE JOHNSON, Appellee, vs. H. J. HUBBART,  
Appellant.

*Opinion filed October 27, 1915.*

1. **EJECTMENT**—*when the defendant cannot insist that plaintiff should have proved title from the government.* A defendant in ejectment cannot insist, upon appeal, that the plaintiff should have proved title from the government because her affidavit of title from a common source was not introduced in evidence, where the defendant did not raise such objection on the trial.

2. **JUDGMENTS AND DECREES**—*judgment for money must specify the precise sum in words or figures.* A judgment for money must specify the precise sum in words or figures, and an alleged judgment for "twenty-four eighty and costs of suit, herein taxed at three and eight cents," is no judgment at all.

3. **SAME**—*transcript of judgment of a justice of peace is the clerk's authority for issuing execution.* The transcript of the judgment of a justice of the peace is the clerk's authority for issuing execution, and if the transcript fails to show the amount of the judgment in dollars and cents, neither the transcript nor the judgment in the justice's docket is admissible in evidence to sustain the sheriff's deed based upon the sale under the execution.

APPEAL from the Circuit Court of Champaign county;  
the Hon. FRANKLIN H. BOGGS, Judge, presiding.

LOUIS A. BUSCH, and GREEN & PALMER, for appellant.

W. A. PERKINS, and A. E. CAMPBELL, for appellee.

Mr. CHIEF JUSTICE FARMER delivered the opinion of  
the court:

Sarah Jane Johnson, the appellee, brought an action of ejectment against H. J. Hubbart, appellant, at the September, 1914, term of the circuit court of Champaign county. Appellant (hereafter called defendant) pleaded the general issue. The case was heard before a jury, and at the close of all the evidence, on motion of appellee, (hereafter called the plaintiff,) the court directed a verdict in her favor and entered judgment that she have and recover the premises described in the declaration, consisting of about three acres.

Plaintiff claimed title through a deed from James E. Harrison, her uncle, executed August 6, 1907, and recorded May 23, 1914. Defendant claimed title through a sheriff's deed to A. W. Abernathy, executed and dated February 6, 1914, filed February 26, 1914, and given pursuant to a sale on execution against James E. Harrison upon a judgment secured before a justice of the peace and a transcript of such judgment filed with the clerk of the circuit court, and by deed from said A. W. Abernathy to defendant, dated May 18, 1914, and recorded June 5, 1914. With the declaration, and attached to it, the plaintiff filed an affidavit that both parties to the suit claimed title from a common source,—James E. Harrison. The plaintiff was a single woman, and she and her uncle, James E. Harrison, also unmarried, lived on a ten-acre tract of land belonging to her uncle, as we understand it, near the three-acre tract in controversy.

To sustain her claim of title plaintiff introduced in evidence the deed to her from James Harrison, and oral proof that Harrison was in possession of the land, claiming to own it, at the time he executed the deed and delivered it to plaintiff, and that she has since that time been in the possession of the land. The proof of plaintiff's possession was not as clear and direct as it might have been made, for the reason that the court erroneously refused to allow witnesses to answer questions as to who had been in possession of the land since the plaintiff obtained her deed, and numerous other questions asked for the purpose of showing possession in plaintiff. Notwithstanding that, we think it must be conceded the proof sufficiently showed plaintiff was in possession. There was no building on the land and it appears not to have been fenced. It was cultivated in grain and grass and was used for pasture part of the time, and the proof shows such acts of authority and dominion over it by plaintiff as to show she was in possession before and at the time defendant's alleged title was acquired.

Plaintiff claimed by virtue of a conveyance from Harrison which was not recorded for nearly seven years after it was made and delivered, and defendant through title acquired by virtue of a sheriff's sale under an execution issued on the transcript of a judgment before a justice of the peace against Harrison.

Plaintiff filed with her declaration, and attached to it, an affidavit that both parties claimed title through the same source,—James Harrison. This affidavit was not introduced in evidence on the trial and is not in the bill of exceptions but is copied as a part of the common law record. The defendant insists the affidavit of title from a common source cannot properly be considered, and that it was incumbent upon plaintiff to prove title from the government, the same as if no affidavit of title from a common source had been filed. This question was not raised on the trial, and defendant is in no position now to raise the objection.

To prove title in himself defendant offered in evidence the transcript of the judgment before the justice of the peace against James Harrison, which was filed with the clerk of the circuit court, and upon which the execution was issued under which the sale was made by the sheriff. Besides other defects and irregularities the transcript recited that the judgment was for "twenty-four eighty and costs of suit, herein taxed at three and eight cents." In a judgment for money the precise sum must be specified either in words or figures, and judgments similar to the one shown by this transcript have been held to be no judgment at all. (*Avery v. Babcock*, 35 Ill. 175; *Carpenter v. Sherfy*, 71 id. 427.) The court correctly sustained objections to the introduction of the transcript in evidence.

Defendant then offered in evidence the judgment in the justice's docket, which recited a judgment for "\$24.80 and costs of suit, herein taxed at \$3.80." Objection was sustained to this, and we think rightly so. The authority of the clerk of the circuit court to issue the execution upon

which the sale was made, depended upon the transcript showing a judgment and not upon the judgment written up in the justice's docket. (*Wooters v. Joseph*, 137 Ill. 113; *Hobson v. McCambridge*, 130 id. 367; *Schmitt v. Weber*, 239 id. 377.) There was no basis, therefore, for the introduction of the sheriff's deed to Abernathy and the deed from Abernathy to defendant.

We do not think there was any error in directing a verdict in favor of plaintiff, and the judgment is affirmed.

*Judgment affirmed.*

THE HAGEN PAPER COMPANY, Appellee, vs. THE EAST ST. LOUIS PUBLISHING COMPANY, Appellant.

*Opinion filed October 27, 1915.*

1. APPEALS AND ERRORS—*when it will be presumed that issue was joined.* If the judgment in a suit at law recites that issue was joined and the cause heard by the jury, it will be presumed on appeal, even though there is no *similiter* in the record to the plea of the general issue, that the issue was joined or that the filing of the *similiter*, which is considered a matter of form, was waived.

2. SAME—*alleged error in ruling on the pleadings is preserved without a bill of exceptions.* Alleged error in overruling a demurrer to a replication is preserved for review without a bill of exceptions, as the object of a bill of exceptions is to preserve for review such matters as occur during the trial which do not appear in the record proper.

3. SAME—*in absence of a bill of exceptions it will be presumed the evidence was sufficient.* In the absence of a bill of exceptions it will be presumed, on appeal in a suit at law, that the plaintiff introduced evidence sufficient to justify the judgment.

4. PLEADING—*when a replication amounts to a plea of confession and avoidance.* A replication to a plea of *nul tiel* corporation, which admits that the plaintiff is a foreign corporation not having an office in Illinois but which alleges that the contract sued upon was made and entered into and is performable in the foreign State, amounts to a plea of confession and avoidance, and if established by the evidence will authorize the plaintiff to maintain the suit.



APPEAL from the Appellate Court for the Fourth District;—heard in that court on writ of error to the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding.

JAY F. VICKERS, for appellant.

W. L. COLEY, for appellee.

MR. CHIEF JUSTICE FARMER delivered the opinion of the court:

Appellee, the Hagen Paper Company, brought an action in assumpsit against appellant, the East St. Louis Publishing Company, in the city court of East St. Louis. The declaration alleged appellee (hereafter called plaintiff) was a Missouri corporation, and that appellant (hereafter called defendant) on December 6, 1911, in St. Louis, Missouri, gave plaintiff eight promissory notes payable at the office of plaintiff in St. Louis, Missouri, the aggregate amount of said notes and interest being \$543.26, which was due and owing, and asked judgment for said amount. The declaration contained the usual common counts. Defendant filed the general issue and a special plea alleging plaintiff was a Missouri corporation organized for profit, not engaged in inter-State commerce, and that the merchandise for which the notes were given, sought here to be collected, was bought within the State of Illinois; that the complainant had not complied with the provisions of our statute applicable to foreign corporations doing business in this State and therefore could not maintain its suit. Plaintiff thereupon filed a replication to defendant's special plea of *nul tiel* corporation, in which it alleged the declaration showed it to be a Missouri corporation, and also showed the eight notes upon which suit was brought were made payable at plaintiff's office in the city of St. Louis, Missouri, and not in Illinois, and that it further appears on

the face of the declaration that the contract between plaintiff and defendant was made in the State of Missouri. From the record it appears the defendant next filed another special plea similar to its plea of *nul tiel* corporation. While it does not clearly so appear, we think plaintiff's replication was made to extend to this special plea. Defendant demurred to the replication to the special plea. The demurrer was overruled by the court. The record does not contain a bill of exceptions, but the judgment of the court as found in the record recites that "on the 22d day of November, 1912, comes the parties, and the issues being joined the court orders a jury, who are duly selected and sworn to try the issues herein, and the jury having heard the evidence and arguments of counsel, return a verdict in favor of plaintiff for \$543.26." From this judgment defendant appealed to the Appellate Court for the Fourth District, where the judgment was affirmed, and the record is brought here for review by appeal, upon a certificate of importance.

Defendant assigns as error the ruling of the trial court in overruling its demurrer to the replication, and also claims that issue was not joined on the plea of *non assumpsit*. Plaintiff insists this assigned error has not been saved for review because not embodied in a bill of exceptions, but that if saved, the court did not err in overruling the demurrer, and further insists that a *similiter* was filed to the general issue.

The record and abstract are unsatisfactory and incomplete, and while no *similiter* to the plea of *non assumpsit* is to be found in the record, the judgment of the trial court recites that issues were joined and the cause heard by a jury. We must indulge the presumption that issue was joined, or that defendant, by proceeding to trial, waived the filing of the *similiter* to the general issue. However, the acceptance of issue, when well tendered, by adding a *similiter*, is considered a mere matter of form. (20 Ency.

of Pl. & Pr. 263; *Gillespie v. Smith*, 29 Ill. 473; *Nieman v. Wintker*, 85 id. 468:.) We think defendant's assigned error to the ruling of the court in overruling its demurrer to plaintiff's replication is saved for review and need not be incorporated in a bill of exceptions. The object of a bill of exceptions is to preserve in the record such matters as occur during the trial which are not a part of the record, and in such case the erroneous ruling must be excepted to; (*McChesney v. City of Chicago*, 151 Ill. 307;) but in a suit at law the record proper includes the declaration, pleas, demurrer, (if any,) judgment upon demurrer, or other judgment, interlocutory or final, (*Baldwin v. McClelland*, 152 Ill. 42,) and an alleged error based upon a judgment rendered on the pleadings is reviewable upon appeal without a bill of exceptions. *Hamlin v. Reynolds*, 22 Ill. 207; *Baker v. People*, 105 id. 452; 3 Ency. of Pl. & Pr. 406.

The record shows evidence was introduced by plaintiff but it was not preserved by bill of exceptions. One of the errors assigned by defendant is that the court erred in denying defendant's motion to exclude plaintiff's evidence. Plaintiff insists that under the state of the record the questions sought to be raised by the assignments of error have not been preserved for review. We have, however, examined the replication to which the demurrer was overruled, and while it is faulty in form, it attempts to, and does substantially, confess and avoid the plea of *nul tiel* corporation. It admits plaintiff is a Missouri corporation, having an office in that State and not in the State of Illinois, and alleges the action is based upon a contract made and entered into and performable in the State of Missouri. The objectionable feature of the replication is its reference to facts alleged in the declaration to constitute or aid plaintiff's plea in confession and avoidance. Without such reference or aid from the declaration, however, we think it a plea of confession and avoidance and that

the demurrer was properly overruled by the trial court. Under the pleadings plaintiff might introduce evidence to show its right to maintain its action and that it was not required to comply with the statute dealing with the right of foreign corporations to transact business in this State. There being no bill of exceptions we must indulge the presumption plaintiff introduced proof sufficient to justify the judgment entered.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

THE BARTHOLOMAE & ROESING BREWING AND MALTING  
COMPANY, Appellant, vs. HELEN MODZELEWSKI *et al.*  
Appellees.

*Opinion filed October 27, 1915.*

1. INJUNCTION—*rules applicable to specific performance apply to bill to enjoin breach of negative covenant.* The jurisdiction of a court of equity to enjoin the breach of a negative covenant in a contract is substantially the same as its jurisdiction to compel specific performance of such contract and is governed by the same rules and principles of law.

2. SAME—*breach of negative covenant will not be enjoined if there is a want of mutuality.* The breach of a negative covenant in a contract will not be enjoined where there is a want of mutuality in its obligations; and this is true although the contract may be of such a character that the difficulties attending its enforcement against one party may not be encountered in enforcing it against the other.

3. CONTRACTS—*what provision in case of breach is not a penalty.* Where the object of a contract between a brewery company and a saloon-keeper is to secure to the company the profits from the sale of its beer, exclusively, during the life of the contract, a provision for the payment of \$50 liquidated damages for each month, during the life of the contract, in which the saloon-keeper fails to keep the agreement will not be regarded as a penalty but as the measure of compensation in case of a breach of the contract.

4. SOLICITORS' FEES—*when allowance on dissolution of injunction is proper.* Where the sole object of a bill is to secure an injunction, and a temporary injunction is issued which is subse-

quently dissolved and the bill dismissed for want of equity, the expense incurred by the defendant for solicitor's fees in securing the dissolution of the injunction, if the amount is reasonable and within the range of the evidence as to the value of the services rendered, is properly assessed against the complainant as damages.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. J. M. O'CONNOR, Judge, presiding.

WINSTON, PAYNE, STRAWN & SHAW, (GEORGE A. KELLY, of counsel,) for appellant.

JAMES P. HARROLD, (TIMOTHY J. FELL, of counsel,) for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

On May 1, 1912, the appellees, Helen Modzelewski and Brun Modzelewski, the owners of the property known as No. 4526 Justine street, in the city of Chicago, entered into a written contract with appellant, the Bartholomae & Roesing Brewing and Malting Company, a corporation, to furnish them with a complete set of saloon and bar fixtures to be used by them in conducting a saloon at those premises. The contract recited that appellees proposed to engage in the saloon business at the above premises and were desirous of purchasing from appellant all of the draught beer sold, used, consumed or given away by them in said saloon premises and of having appellant loan to them a first-class set of saloon furniture and fixtures to be used in the premises, and that appellant desired to sell draught beer to them and to loan them a first-class set of saloon furniture and fixtures. The contract further provided, (appellant being designated as the party of the first part and appellees as the parties of the second part,) among other things, as follows:

"Now, therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth to be kept and performed by the parties hereto, it is mutually covenanted and agreed by and between the parties hereto, as follows:

"(1) The parties of the second part agree to conduct a saloon business continuously and exclusively upon the first floor of the premises 4526 Justine street, Chicago, Illinois, for the period of time extending from the date hereof up to and including April 30, 1917, and further agree that during said period of time they will purchase from the party of the first part, and from no other person, firm or corporation whatsoever, all of the draught beer sold, used, consumed or given away by them in and about said saloon business, and will pay therefor in cash, upon delivery, the market prices of said first party's beers in the city of Chicago, the prices now being \$4.50 per barrel for the grade and brand known as 'City' beer and \$6 per barrel for the grade and brand known as 'Cabinet' beer. The parties of the second part agree that during said period of time they will not purchase any draught beer for sale, use or consumption on said premises from any other person, firm or corporation than the party of the first part. \* \* \*

"(3) The party of the first part agrees to sell and deliver to the parties of the second part beer for the period of time herein mentioned and at the prices herein named, said deliveries to be made during the regular business hours of said first party, times of riot, strikes, fire, Sundays and holidays excepted, at the option of the first party.

"(4) The said parties of the second part agree to use continuously and exclusively in the conduct of said saloon business the bottled beers as manufactured and sold by the party of the first part, the United States Brewing Company of Chicago and the Val. Blatz Brewing Company, and will pay therefor in cash, upon delivery, the market price of

said bottled beers in Chicago, excepting such bottle beers that are specifically asked for by their patrons.

“(5) The party of the first part agrees to loan to the parties of the second part a first-class set of saloon furniture and fixtures, the style and quality of which have been previously agreed upon by the parties hereto, during the term hereof, so long as said second parties shall fully and faithfully comply with all the terms and conditions of this contract by them to be kept and performed. It is understood and agreed that said saloon furniture and fixtures are, and are to remain, the property of the party of the first part, and said parties of the second part agree to execute the customary fixture-receipt of the party of the first part therefor.

“(6) The parties of the second part expressly agree that they will not permit a dram-shop to be conducted on any of the properties of Justine street between Forty-fifth and Forty-sixth streets in which they have any interest of whatsoever kind and nature, during the term hereof, other than at the premises hereinbefore mentioned.

“(7) The party of the first part expressly agrees that so long as the parties of the second part shall have faithfully complied with all the covenants in this contract contained by them to be kept and performed, it will allow the parties of the second part the sum of \$25 per month to be applied on beer purchased during the preceding month.

“(8) It is further agreed and understood by and between the parties hereto, that if the parties of the second part shall at any time during the term of this contract make default herein or fail to keep and live up to all the covenants and agreements herein set forth to be kept and performed by them, or shall fail to purchase until the expiration hereof all the draught beer of the party of the first part and the bottled beer and pay therefor as herein provided, then and in that event they shall pay to the party of the first part, as liquidated damages, the sum of \$50 per

month for each and every month and fraction of a month covering the unexpired term, viz., from the date of such default to and including April 30, 1917. The parties of the second part agree to pay such liquidated damages to the party of the first part upon demand, and upon the failure of the parties of the second part to pay such liquidated damages to the party of the first part, the party of the first part shall have the right to use any and all necessary and proper means to enforce the payment of the same. It is understood and agreed that in the event the said demised premises are destroyed by fire, then and in that event the parties of the second part shall have six months from the date of such fire during which time to re-build, and during which time the penalty herein mentioned shall be in-operative."

Some time prior to May 2, 1913, a dispute arose between the parties as to whether or not appellant was complying with this contract and with another contract alleged to have been made by it with appellees through its manager, John F. Seitz, on July 18, 1912, in which it agreed to allow the appellees four and one-half barrels of beer on each monthly sale of beer to May, 1913, provided the sale of beer averaged the same as for the months of May and July, 1912. On May 2, 1913, appellees refused to buy any more beer from appellant, moved out the saloon fixtures and furniture loaned to them by the appellant, and made arrangements to use the beer of the Mullen Brewing Company. Appellant then filed its bill of complaint in the superior court of Cook county, alleging full performance of the contract on its part, the breach of the contract by appellees, the removal of the saloon furniture and fixtures from the premises, and that they were purchasing draught beer to be sold by them on the premises from the Mullen Brewing Company, and represented that they would continue to purchase from the Mullen Brewing Company all the draught beer sold, used or consumed by them in and



about said premises and would no longer purchase draught beer from appellant; that appellant has no adequate remedy at law for the breach of the contract, for the reason that the damages that will be sustained by it by reason of the continued refusal of appellees to carry out and perform the contract cannot be ascertained; that it will suffer irreparable injury unless a court of chancery intervenes, by injunction, to prevent the further violation of the contract by appellees. The bill prayed for an injunction restraining appellees from directly or indirectly purchasing for sale or consumption in said premises, or from selling or permitting to be sold in said premises, any other draught beer than that manufactured and sold by appellant, and from in any way violating the alleged negative covenant contained in the agreement of May 1, 1912.

A motion was made for a temporary injunction, and the cause was referred to the master in chancery to examine into the matter and report his conclusions to the court. The master made a report recommending that a temporary injunction be allowed. Thereupon appellees filed their answer, admitting the violation of the contract on their part and alleging that the refusal to comply with the contract was brought about by reason of the breach of the contract of appellant made by its general manager on July 18, 1912, by which appellees were to be allowed a rebate of four and one-half barrels of beer for each monthly sale of beer to May, 1913, and by the refusal of the appellant to allow them a credit of \$25 per month for the months of February, March and April, 1913, as provided in the seventh clause of the contract. The answer further alleged that appellant had an adequate remedy at law in case there had been any breach of the contract because of the provision in clause 8 which provided that in case of a breach of the contract by appellees they shall pay to appellant, as liquidated damages, \$50 per month for each and every month and fraction of a month covering the unex-

pired time from the date of such default to and including April 30, 1917. A motion was then made to dissolve the injunction upon the bill, answer and affidavits. The court overruled this motion and appellees perfected an appeal to the Appellate Court for the First District, where the decree was reversed and the cause remanded to the superior court with directions to dissolve the injunction, for the reason, as stated by that court in its opinion, that the appellant had an adequate remedy at law. The case is reported in 183 Ill. App. 352. The cause was then re-instated in the lower court and an order entered dissolving the injunction and dismissing the bill for want of equity. Thereupon appellees filed their petition in that court for assessment of damages for the wrongful issuance of the injunction. A hearing was had and appellees were allowed the sum of \$250 as damages for the wrongful suing out of the injunction, that being the amount the evidence showed they had paid their attorneys for services in this particular matter. From that decree appellant perfected an appeal to the Appellate Court for the First District, where the decree of the lower court was affirmed. A certificate of importance and appeal were allowed by that court and the case is now in this court pursuant thereto.

The grounds urged for a reversal of the decree are, (1) that the court erred in dismissing the bill for want of equity; and (2) that the court erred in allowing appellees \$250 as damages for the wrongful issuance of the temporary restraining order.

It is insisted the bill only seeks to prevent the breach of an express negative covenant in the contract and will require no affirmative action on the part of appellees, and hence, although it may result, in a sense, in an indirect specific performance of the contract, it is nevertheless not governed by the rules of law applicable to such cases, and for this reason the court should have enjoined the breach of the contract independently of the question as to whether

or not the appellant had an adequate remedy at law. With this contention we do not agree. The rule is well settled in this State that the jurisdiction of a court of equity to enjoin the breach of a negative covenant in a contract is substantially the same as its jurisdiction to compel a specific performance of such contract and is governed by the same rules and principles of law. (*Welty v. Jacobs*, 171 Ill. 624; *Ulrey v. Keith*, 237 id. 284.) The rule as to specific performance is, that a contract cannot be specifically enforced unless there is such mutuality in its obligations that it may be enforced by either party against the other. (*Bauer v. Lumaghi Coal Co.* 209 Ill. 316; *Ulrey v. Keith*, *supra*; *Africani Loan Ass'n v. Carroll*, 267 Ill. 380.) And this is true although the contract may be of such a character that the difficulties attending its enforcement against one of the parties might not be encountered in enforcing it against the other. (*Rutland Marble Co. v. Ripley*, 10 Wall. 339.) The contract in this case is of that character. By its third clause appellant agrees to sell and deliver to appellees beer for the period of time mentioned in the contract at the price therein named, and by the fifth clause to loan appellees a first-class set of saloon furniture and fixtures so long as they shall faithfully comply with all the terms and conditions of the contract. The principal obligation assumed by appellant is to manufacture and sell its product to appellees for the period covered by the contract. This involves a knowledge of appellant's process of manufacture, skill and personal labor in making such product, and is, in effect, a personal contract to manufacture and deliver to appellees draught beer of a particular kind and quality, viz., "City" beer and "Cabinet" beer, and should appellant refuse to comply with this provision of the contract a court of equity would be powerless to compel specific performance of the same without taking over and supervising the business of appellant for the whole unexpired term of the contract. This, courts of equity will not

attempt to do. (*Rutland Marble Co. v. Ripley*, *supra*; *Voight Brewing Co. v. Holtz*, 168 Mich. 552.) It will thus be seen that the contract lacks mutuality, and is one which, had the breach been committed by appellant, no specific performance of the same could have been decreed by the court but appellees would have been left to seek their remedy in an action at law for damages for a breach of the contract. If we treat the rights of the parties as being reciprocal in the premises, as they are, then we must hold that the court did not err in dismissing the bill for want of equity unless it appears that appellant will suffer an irreparable injury for which the law affords it no adequate remedy at law.

This brings us to the question, has appellant an adequate remedy at law? By the eighth paragraph of the contract it is specifically provided that if appellees shall at any time fail to keep and live up to the covenants and agreements of their contract, and shall make default in part of the contract and fail to purchase all of the draught beer of the party of the first part as therein provided for, then and in that event they shall pay to the party of the first part, as liquidated damages, the sum of \$50 per month for each and every month and fraction of a month covering the unexpired period of the contract from the date of such default to and including April 30, 1917. It will thus be seen that the parties themselves have by the express terms of their contract made provision for its breach and for the amount of damages that shall be paid in case of such breach, by way of liquidated damages, unless the same is held to be a penalty. That the object and purpose of the contract on the part of appellant were to secure to it the profits from the sale of its beer on the premises during the period of time covered by the contract is very clear from a consideration of the whole instrument. These profits, from their very nature, were of an uncertain character and difficult to estimate or ascertain with any degree

of certainty. No one could estimate the amount of draught beer of the different kinds appellees would use per month, and each month, during the life of the contract. This must have been fully known to both the contracting parties, and they may well be presumed to have taken all of these matters into consideration in making the contract and fixing the amount of damages in case the contract was broken. Both parties were undoubtedly familiar with the business and deemed themselves better able to estimate and compute the amount of damages from that source than anyone else, and believed that by this provision in the contract they had done so. It does not appear to us that the amount so estimated and fixed by them is either unreasonable or disproportionate to the damages which might ensue from a breach of the contract. Under such circumstances the stipulated sum will not be held to be a penalty, where, from a consideration of the whole instrument, its object and purpose and the circumstances surrounding the parties at the time of its execution, it is clear the parties intended it as the measure of compensation in case of a breach of the contract; (19 Am. & Eng. Ency. of Law,—2d ed.—398; 13 Cyc. 93, 94, 98;) and there is nothing to indicate fraud or circumvention, or that the amount specified is unreasonable or disproportionate to the amount of damages which might reasonably be anticipated as likely to result from a breach of such contract. (*Gobble v. Linder*, 76 Ill. 157; *Pinkney v. Weaver*, 216 id. 185.) In this respect this case is clearly distinguishable from *Southern Fire Brick Co. v. Garden City Sand Co.* 223 Ill. 616, in which the property (real estate) which was the subject matter of the contract had been disposed of, the contracting party owning the real estate was insolvent, and there was no provision in the contract for the payment of any amount as liquidated damages in case of its breach. The same may be said to be true of substantially all of the other cases cited by appellant. They are therefore not in point here, where it is ad-

mitted that appellees are perfectly solvent and the damages in case of a breach of the contract have been estimated and fixed by the parties. If an injunction were to be issued, under the facts admitted in this case, to prevent a breach of this agreement, we fail to see how an injunction could be refused in any case to prevent the breach of all similar contracts where a business man agreed to sell in his place of business the products of a certain dealer and to refuse to sell any others. This would, in our judgment, be opposed to both reason and authority. (High on Injunction,—4th ed.—1107; *Hair Co. v. Huckins*, 5 C. C. A. 522; *Steinaw v. Cincinnati Gaslight and Coke Co.* 48 Ohio St. 324; *Hardy v. Allegan Circuit Judge*, 147 Mich. 694; *Tawas and B. C. R. R. Co. v. Circuit Judge*, 44 id. 479; 7 N. W. Rep. 65.) For these reasons we think the court did not err in dissolving the injunction and dismissing appellant's bill for want of equity.

The sole object of the bill in question was for injunction, and at the instance of appellant a temporary restraining order was issued. Its issuance was wrongful, and as a result of its wrongful issuance appellees were put to an expense in and about their endeavors to have the same dissolved, as the evidence shows, of upward of \$250 in attorneys' fees alone. The court below allowed them \$250 as their damages for the wrongful suing out of the injunction and assessed the same against the appellant. The amount allowed was well within the range of the testimony as to the value of the services rendered, and upon a consideration of the record we do not consider the amount allowed excessive.

For the reasons given, the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

W. J. HASKELL, Appellant, *vs.* WILLIAM F. HOWARD *et al.*  
Appellees.

*Opinion filed October 27, 1915.*

**MUNICIPAL CORPORATIONS**—*city has no power to prohibit advertisements of liquor dealers.* A city has no power to enact an ordinance prohibiting the display, within the city limits, of any sign or advertisement of a wholesale or retail liquor dealer, where the prohibition is not limited to advertisements for the sale or the taking of orders for sale of liquor in the city, which is anti-saloon territory, but purports to prohibit the posting or displaying of any advertisement of intoxicating liquor.

APPEAL from the Circuit Court of Douglas county; the Hon. FRANKLIN H. BOGGS, Judge, presiding.

ACTON & ACTON, for appellant.

JOHN H. CHADWICK, for appellees.

Mr. CHIEF JUSTICE FARMER delivered the opinion of the court:

This appeal is prosecuted to review a decree of the circuit court of Douglas county dismissing for want of equity a bill in chancery filed by appellant.

Appellant, W. J. Haskell, on December 5, 1911, secured from appellee William F. Howard the privilege of placing a bill-board on the private premises of said appellee in the incorporated city of Villa Grove, Illinois, for a period of five years. It is stipulated the bill-board was constructed of lumber and properly placed on the lot of Howard, facing the right of way of the Chicago and Eastern Illinois Railroad Company, and as placed was not dangerous to any person; that said bill-board showed the following sign: "Demand Fecker Beer.—Brewed at Danville, Illinois." It is stipulated the city of Villa Grove is in anti-saloon territory, and that appellant is under contract to the Fecker Brewing Company of Danville, Illinois,

to maintain such sign. Appellee the city of Villa Grove subsequently, on February 10, 1914, passed an ordinance, section 7 of which is as follows:

"Sec. 7. Whosoever shall, by himself or another, directly or indirectly, within said corporate limits, display or post, or suffer to remain displayed or posted, upon any vehicle used by him, or in, on or about any building or premises occupied by him, any sign or other advertisement indicating that intoxicating liquor, or spirituous, vinous, malt or fermented liquor, or any so-called temperance drinks which contain any spirituous, vinous, malt or fermented liquor, are kept, stored or dealt in at such building or premises, or shall suffer any sign or advertisement of any wholesale or retail liquor dealer to be displayed or posted upon any vehicle used by him, or in, on or about any building or premises occupied, owned or leased by him or under his control, shall be deemed guilty of suffering a nuisance to exist, and upon conviction thereof shall be fined not less than twenty dollars (\$20) nor more than two hundred (\$200) for each and every day, or fraction thereof, he shall permit any such sign to be posted or displayed."

Appellee Howard, at the direction of the mayor of the appellee city of Villa Grove, on May 1, 1914, tore down said bill-board and sign, and both appellees refuse to permit the same to be again erected and the sign maintained. On January 8, 1915, appellant filed his bill of complaint in the circuit court of Douglas county, alleging said section 7 of the ordinance is void and asking for the specific performance of his contract with appellee Howard giving him the right to maintain said bill-board and sign, and for damages sustained. Appellees answered said bill, conceding to appellant the right to erect and maintain said bill-board but denying the right to maintain the sign advertising Fecker beer and complainant's right to the relief prayed. Upon a hearing the bill was dismissed for want of equity. The trial judge certified that the validity of a municipal ordi-



nance was involved and that the public interest required the appeal to be prosecuted direct to this court, which was accordingly done.

It was stipulated between appellees and appellant that the only question for decision is the validity of section 7 above set out, which, in effect, prohibits individuals from maintaining, displaying or posting on private property within the corporate limits of Villa Grove any sign or advertisement of any wholesale or retail liquor dealer and declaring the same to be a nuisance. It was further stipulated and agreed between the parties that if said ordinance is held void appellant is entitled to the relief prayed and nominal damages against appellee Howard.

The briefs of counsel on both sides are devoted largely to a discussion of the power of municipalities to regulate the construction and use of bill-boards within the corporate limits. There is no doubt they have such power, but the regulation must be reasonable. (*City of Chicago v. Gunning System*, 214 Ill. 628; *Cusack Co. v. City of Chicago*, 267 id. 344.) The object of the ordinance here involved was not the control and regulation of either the construction, location or use of bill-boards, but the purpose of its enactment was to prohibit any sign or advertisement of any wholesale or retail liquor dealer being displayed within the corporate limits of the city. The prohibition was not merely against the display of such signs on bill-boards, but was against their being displayed or posted upon any vehicle, or in, on or about any building or premises in the corporate limits of the city. The ordinance purports to prohibit the posting or displaying of any advertisement of intoxicating liquor. No express power is given municipalities by the Cities and Villages act to pass such an ordinance. If the power exists it must be implied from the powers expressly conferred.

The argument of appellees that the power to pass such an ordinance exists or is implied as incidental to the power

to regulate or prohibit the sale of intoxicating liquors, or that it arises out of the statute which forbids taking orders for the sale and delivery of intoxicating liquors in anti-saloon territory, is untenable. The ordinance is not limited to advertisements for the sale of liquor in Villa Grove nor to advertisements for taking orders for the sale and delivery of intoxicating liquors in that city. The prohibition of such advertisements is unnecessary to and has no reasonable connection with the power to prohibit the sale of liquor in said city. If the power to prohibit such advertisements is to be implied, it must be because their display affects the public health, safety, morals or welfare. By no stretch of the imagination could it be made to appear that such advertisements threaten or injuriously affect the public health or safety. If the ordinance can be sustained at all it must be because they injuriously affect the morals or welfare of the public. It is a matter of common observation that a great many manufacturers extensively advertise their products by display signs in cities and along the lines of railroads and public highways. So far as we are aware it has never been held that the advertisement of its beer by a brewery was so injurious to the public morals as to make it a nuisance *per se* and authorize it being prohibited. The use of intoxicating liquors is objectionable to a great many people; but so, also, is the use of tobacco, coca cola and chewing gum, but they are the products of lawful manufacture, and so long as that is so we do not see how their advertisement can be prohibited. It would seem inconsistent to say that a product may be lawfully manufactured for the consumption of all who desire it but the advertisement of it may be prohibited as an offense against public morals. The exercise of the police power is limited to enactments tending to promote the public health, safety, morals or general welfare. It is for the legislature to determine when an exigency exists for the exercise of the police power, but what is the subject of such exercise is a judicial question.

Under the guise of police regulation the personal rights or liberties of citizens cannot be arbitrarily invaded. (*Ruhrstrat v. People*, 185 Ill. 133; *Bailey v. People*, 190 id. 28; *Haller Sign Works v. Training School*, 249 id. 436.) In *People v. City of Chicago*, 261 Ill. 16, it was held that if a city was clothed with the whole police power of the State it would not have authority to deprive a citizen of valuable property rights under the guise of prohibiting or regulating something that had no tendency to injure the public health, safety, morals or general welfare. In *Haller Sign Works v. Training School*, *supra*, it was held the police power does not justify interference with private rights for purposes unconnected with the safety, health, morals or general welfare of the public. Cases not precisely in point but in some measure analogous in principle are *Sullivan v. City of Oneida*, 61 Ill. 242, where it was held the power to declare the selling, giving away or keeping on hand for sale intoxicating liquors a nuisance did not authorize the enactment of an ordinance making it an offense for any person in the city to have in his possession intoxicating liquor, and *City of Carthage v. Munsell*, 203 Ill. 474, where the city adopted an ordinance prohibiting the sale of liquor within its limits, and an ordinance making the delivery of intoxicating liquor by a carrier to the consignee a sale was held void.

We are of opinion the enactment of the ordinance here involved was unauthorized, that it is unreasonable and an unlawful invasion of the rights and liberties of citizens and void.

The decree of the circuit court is reversed and the cause remanded, with directions to enter a decree granting the relief prayed, in accordance with the stipulation of the parties.

*Reversed and remanded, with directions.*

THE PEOPLE *ex rel.* Commissioners of Highways of the Town of Hutsonville, Appellants, *vs.* THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Appellee.

*Opinion filed October 27, 1915.*

1. HIGHWAYS—*when abandonment of an old road may be presumed.* Where the public has ceased to travel a road and has acquired a new road which accommodates public travel an abandonment of the old road may be presumed.

2. SAME—*commissioners have the power to decide between two roads.* Public authorities having charge of highways are invested with the right to decide between relative advantages of two roads.

3. SAME—*when an old road will be regarded as abandoned.* Where a highway ceases to be used and another is acquired in its place with the consent and approval of the public authorities, and the use of the old road has ceased for a sufficient period to clearly indicate an acceptance by the public of the new highway, the old one will be regarded as abandoned.

4. SAME—*when doctrine of equitable estoppel will be applied.* While mere non-user or adverse possession, alone, cannot divest public rights in a highway, yet where there are circumstances indicating a complete abandonment by the public, and persons in good faith have expended money and so acted that to permit the assertion of the public right would perpetrate a fraud upon them, the doctrine of equitable estoppel will be applied and the public will be bound by the apparent complete abandonment of its rights.

APPEAL from the Circuit Court of Crawford county; the Hon. ENOCH E. NEWLIN, Judge, presiding.

JOSEPH B. CROWLEY, State's Attorney, and PARKER & EAGLETON, for appellants.

P. J. KOLB, (L. J. HACKNEY, and FRANK L. LITTLETON, of counsel,) for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The commissioners of highways of the town of Hutsonville, in Crawford county, filed a petition in the circuit court the object of which was to secure a writ of *mandamus*

requiring the Cleveland, Cincinnati, Chicago and St. Louis Railway Company to construct crossings and approaches for a public highway over its tracks. The railway company answered the petition, a trial was had before the court without a jury and a judgment was rendered in favor of defendant, from which the relators have appealed.

In March, 1906, the railway company was re-constructing its railroad which crossed the highway in controversy. The highway ran east and west and the railway north and south. The railway company owned a tract of land containing about thirty acres adjoining its right of way, which was underlaid with gravel. The public road extended across this thirty-acre tract and the right of way of the railway company. On March 13, 1906, the railway company began to excavate and remove the gravel from the road, and on March 15 the commissioners of highways of the town of Hutsonville filed a bill for an injunction to restrain the railway company from excavating the highway. At the September term, 1906, of the circuit court an order was entered that the cause be dismissed "as per the stipulation in writing filed, which said stipulation is in words and figures as follows." The stipulation stated that by agreement of parties the cause had been settled and all rights between the parties amicably adjusted growing out of the abandonment of the old public highway (describing it) and that a new highway was dedicated, and the description of the new highway was given. The stipulation acknowledged the receipt of the further consideration of \$300 paid by the railway company to the commissioners, and it was agreed that the railway company waived all question of damages growing out of the injunction and that the suit might be dismissed at its costs. The railway company excavated and removed dirt and gravel from the thirty-acre tract of land and in so doing excavated across the location of the road. The excavations were of an average depth of about twelve feet below the grade of the former road, rendering it wholly un-

fit for use as a public highway and leaving it in such condition as would require the expenditure of from \$1500 to \$3000 to restore it to a passable condition. The new road mentioned in the stipulation in the injunction suit ran south from the old road on the west side of the excavation to the south end of the thirty-acre tract, then east along the south edge of that tract, crossing the right of way of the railway company, connecting on the east side with a highway running north and south. It has been partially fenced, the railway company maintaining a crossing over its track where the new road crosses it. The use of the old road has ceased entirely and the public travel has been over the new road continuously until the bringing of this suit.

Where the public has ceased to travel a road and acquired another which accommodates the public travel, an abandonment of the first road may be presumed. The public authorities having charge of the highways are invested with the right to decide between the relative advantages of the two roads. Where a highway ceases to be used and another is acquired in its place with the consent and approval of the public authorities, and the use of the original highway has ceased for a sufficient length of time to clearly indicate an acceptance by the public of the new highway, the old one will be regarded as abandoned. (*Highway Comrs. v. Kinahan*, 240 Ill. 593.) Mere non-user or adverse possession, alone, cannot divest public rights in public highways, but where there are circumstances indicating a complete abandonment by the public, and persons in good faith have expended money and so acted toward the premises that to assert the public rights would be to perpetrate a fraud upon them, the doctrine of equitable estoppel will be applied and the public will be held bound by the apparent complete abandonment of its rights. (*People v. City of Rock Island*, 215 Ill. 488; *Sanitary District of Chicago v. Metropolitan Elevated Railway Co.* 241 id. 622.) Here

the public officials expressly agreed that the road should be abandoned and the new road dedicated in its place and received the further consideration of \$300 from the railway company. Since then for years no public right has been exercised in the old road but it has been held adversely to such rights with the acquiescence of the public, and neither the public authorities nor any individual until the present time has sought to prevent such adverse occupation and use.

The propositions of law which were presented to the court by the appellants and refused were based upon the hypothesis that the doctrine of equitable estoppel does not apply to the people or public authorities. They were therefore erroneous and the court did not err in refusing them.

We find no error in the record, and the judgment is affirmed.

*Judgment affirmed.*

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MARSHALL FIELD & Co., Appellant, vs. ISIDOR B. FREED,  
Appellee.

*Opinion filed October 27, 1915.*

1. DEBTOR AND CREDITOR—*when issuing execution does not bar right to capias ad satisfaciendum.* In cases where an execution against the body is authorized by law, the judgment creditor does not, by having an execution issued, waive or bar his right to a *capias ad satisfaciendum* when the execution is returned unsatisfied, as both remedies are authorized by section 4 of the act on judgments, decrees and executions and both may be followed, although there can be but one satisfaction.

2. SAME—*judgment creditor in action for tort not required to make affidavit for a capias.* In an action for a tort the judgment creditor may have a *capias ad satisfaciendum* after the return of an execution unsatisfied, without making the affidavit required by section 62 of the act concerning judgments, decrees and executions.

3. SAME—*section 62 of act concerning judgments, decrees and executions construed.* The purpose of section 62 of the act concerning judgments, decrees and executions is to authorize an execution against the body upon any judgment, whether in contract or

in tort, if the judgment creditor will make the affidavit therein provided for; but where the judgment is for a tort the plaintiff is entitled to a *capias ad satisfaciendum* upon motion, without any affidavit or showing in support of it.

APPEAL from the Branch "D" Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding.

FRANK P. LEFFINGWELL, for appellant.

Mr. CHIEF JUSTICE FARMER delivered the opinion of the court:

This suit is an action on the case begun by appellant, as plaintiff, in the superior court of Cook county, against appellee, as defendant. The declaration charged defendant with procuring from the plaintiff goods, wares and merchandise on a credit by fraud and deceit and by means of a false statement in writing. Defendant was served with process and entered his appearance, but failing to plead was defaulted and the damages assessed by a jury in the sum of \$778.95, upon which judgment was entered in favor of plaintiff, against defendant. An execution against the property of the defendant was issued and placed in the hands of the sheriff of Cook county. At the expiration of ninety days it was returned *nulla bona*. The return to the execution stated that the sheriff had demanded payment of the defendant or that he surrender sufficient property to satisfy the execution, but that the defendant failed to pay the same or deliver property in satisfaction thereof and the sheriff was unable to find any property of defendant. Two days after the return of the execution an order for a *capias ad satisfaciendum* was entered by the superior court. The *capias* was issued and delivered to the sheriff, by virtue of which he took defendant into custody. On the following day, on motion



of defendant, the *capias* was quashed and he was released from custody. The plaintiff thereupon filed a motion in the superior court to vacate the order quashing the *capias ad satisfaciendum*, which motion was denied. Exceptions were duly preserved and plaintiff sued out a writ of error from the Appellate Court to review the orders and judgment of the superior court quashing the *capias* and overruling the motion to set aside said order. The Appellate Court affirmed the judgment of the superior court and granted a certificate of importance, upon which an appeal is prosecuted by plaintiff below to this court.

We are not favored with the aid and assistance of any brief on behalf of appellee.

After the return of the execution against the property of appellee a *capias ad satisfaciendum* was issued upon motion of appellant and without any showing made in support of the motion. We are informed by the brief of appellant and the opinion of the Appellate Court that the superior court, on the motion to quash the *capias*, was of opinion that under section 4 of chapter 77 (Hurd's Stat. 1913, p. 1494,) a party in whose favor a judgment was rendered, and who may have a right to an execution against the property of a defendant or against his body, is required to elect which remedy he will pursue, and that when he elects one he cannot afterward resort to the other.

Section 4 reads as follows: "The person in whose favor any judgment, as aforesaid, may be obtained, may have execution thereon in the usual form, directed to the proper officer of any county in this State, against the lands and tenements, goods and chattels of the person against whom the same is obtained, or against his body, when the same is authorized by law."

It is the contention of appellant that the word "or" means and should be read as "and." The Appellate Court did not agree with that view, but held that a judgment creditor having sued out an execution against the property

of the judgment debtor in the first instance, cannot, after its return unsatisfied, have a *capias ad satisfaciendum* except by making an affidavit in compliance with the provisions of section 62 of chapter 77. (Hurd's Stat. 1913, p. 1500.)

Section 62 is as follows: "If, upon the return of an execution unsatisfied, in whole or in part, the judgment creditor, or his agent or attorney, shall make an affidavit stating that demand has been made upon the debtor for the surrender of his estate, goods, chattels, land and tenements, for the satisfaction of such execution, and that he verily believes such debtor has estate, goods, chattels, lands or tenements, not exempt from execution, which he unjustly refuses to surrender, or that since the debt was contracted or the cause of action accrued, the debtor has fraudulently conveyed, concealed, or otherwise disposed of some part of his estate, with a design to secure the same to his own use, or defraud his creditors; and also setting forth upon his knowledge, information and belief, in either case, the facts tending to show that such belief is well founded, and shall procure the order of the judge of the court from which the execution issued, or of any judge or master in chancery in the same county, certifying that probable cause is shown in such affidavit to authorize the issuing of an execution against the body of the debtor, and ordering that such writ be issued; upon the filing of such affidavit and order with the clerk, he shall issue an execution against the body of such judgment debtor."

We have before set out in full section 4, which authorizes an execution in favor of the judgment creditor against the property of the judgment debtor, "or against his body, when the same is authorized by law." Section 5 of the same act specifies the cases in which a *capias* may be issued. They are, (1) where the judgment is obtained for a tort committed by the defendant; (2) where the de-

fendant shall have been held to bail upon a writ of *capias ad respondendum*; (3) where he shall refuse to deliver up his estate for the benefit of his creditors. Clearly, no affidavit is required to be filed to procure the issuance of a *capias* where the judgment was obtained for a tort or where the defendant shall have been held to bail upon a writ of *capias ad respondendum*. If a *capias* is sought upon the third ground upon which it is authorized by section 5, it seems equally clear that before it will issue it is required to be shown, in accordance with the provisions of section 62, that the judgment debtor refuses to deliver up his estate for the benefit of his creditors. It seems plain it was never intended by the statute that in cases where an execution against the body was authorized by law the plaintiff in the judgment should be required to elect whether he would have such an execution issued or an execution against the property of the defendant, and that having elected one he should not be permitted afterwards to resort to the other. There can, we think, be no question that where a judgment is obtained for a tort committed by the defendant the plaintiff is not compelled to have a *capias ad satisfaciendum*, but may resort to an execution against the property of the defendant as in case of a judgment upon a contract express or implied. Both remedies are authorized and may be pursued, but only one satisfaction may be had. Whether executions against the body and against the property of a defendant may be issued at the same time is not involved, but upon the issuance of one, and its return unsatisfied, the plaintiff in the judgment may resort to the other remedy. (*Lambert v. Wiltshire*, 144 Ill. 517; *Taylor v. Thompson's Lessee*, 5 Pet. 358.) In our opinion it was never contemplated nor required that in cases where the judgment was for a tort committed by the defendant, or where a defendant has been held to bail upon a writ of *capias ad respondendum*, the plaintiff should make an affidavit, in compli-

ance with section 62, to authorize the issuance of a *capias ad satisfaciendum*. In the case before us the judgment was in an action of tort in which malice was the gist of the action. The judgment was the authority for issuing an execution against the body, and not a showing by affidavit, under the provisions of section 62, that the debtor had property which he unjustly refused to surrender, or that since the debt was contracted he had fraudulently conveyed, concealed or otherwise disposed of property with a design to secure the same to his own use or to defraud his creditors. The purpose of section 62 was to authorize an execution against the body upon any judgment, whether in tort or upon a contract, if the plaintiff in the judgment will file an affidavit complying with the requirements of that section. Under section 5, if the judgment is for a tort committed by the defendant, an execution against the body is authorized without regard to whether the defendant has or has not property and without regard to whether he has refused to deliver his estate up for the benefit of his creditors. While this construction seems to us free from difficulty, reference to previous legislation on this subject may not be unprofitable.

Section 5 of chapter 57 of the Revised Statutes of 1845, which is the chapter on judgments and executions, is substantially the same as section 4 of our present statute, except that it contains a proviso that no execution shall issue against the body except as provided in chapter 52 of the Revised Statutes of 1845. The chapter referred to is the chapter on insolvent debtors, and section 1 of that act authorizes an execution against the body upon affidavit by the plaintiff or his attorney that the debtor refuses to surrender property for the satisfaction of an execution issued against the property of such debtor. Section 5 of chapter 57 of the Revised Statutes of 1845 had no reference to judgments in actions in tort, for section 6 of the same act reads: "Nothing herein shall restrain or

prevent any execution from being issued against the body of any defendant, where the judgment shall have been obtained for a tort or a trespass committed by such defendant." Construing the two sections together, section 6 can only mean that where the judgment was obtained for a tort or a trespass, the provisions of chapter 52 referred to in section 5 had no application. Section 5 of the act of 1845 is, with slight changes, section 4 of the present statute. Section 1 of chapter 52 of the Revised Statutes of 1845 is, in substance, found in section 62 of the present statute, and section 5 of the present statute takes the place of section 6 of chapter 57 of the Revised Statutes of 1845.

We are in harmony with the view of the Appellate Court that appellant was entitled to have issued, after the return of the execution against the property unsatisfied, a *capias ad satisfaciendum*, but as we understand and construe the statute no affidavit in compliance with the provisions of section 62 was required. The judgment was for a tort committed by the defendant, and appellant was entitled to the writ, upon motion, without any showing in support of it. This precise question has not been previously decided by this court, but this view has been taken of the statute by the Appellate Court in *Kitterman v. People*, 181 Ill. App. 682, and *Nelson v. Swanson*, 186 id. 632, and by the Federal court for the northern district of Illinois in *Barney v. Chapman*, 21 Fed. Rep. 903, and that, we think, is the correct construction of the statutory provisions referred to.

The judgment of the Appellate Court and the judgment of the superior court of Cook county are reversed and the cause remanded to the superior court, with directions to vacate and set aside the order quashing the *capias ad satisfaciendum*.

*Reversed and remanded, with directions.*

JOHN DONOUGH *et al.* Appellees, *vs.* EDWARD GARLAND  
*et al.* Appellants.

*Opinion filed October 27, 1915.*

1. REAL PROPERTY—*the expectancy of a prospective heir may be released or assigned.* The expectancy of a prospective heir of a living person may be released to the ancestor or assigned to a stranger, and in case of a release to the ancestor a court of equity will enforce the contract for the benefit of the other heirs.

2. SAME—*effect of release by an heir presumptive.* A release by an heir presumptive of his expectancy operates as an extinguishment of the right of inheritance, cutting it off at its source, and such release is binding not only upon him but upon those who take as heirs in his place.

3. SAME—*effect of assignment of expectancy of heir.* Where the expectancy of an heir is assigned to another and not released the right of inheritance still exists and the assignment is enforced in equity as a contract to convey the legal estate or interest when it ceases to be an expectancy and becomes a vested estate; but if the legal estate never vests in the assignor the assignee acquires nothing. (*Simpson v. Simpson*, 114 Ill. 603, explained.)

APPEAL from the Circuit Court of LaSalle county; the Hon. EDGAR ELDREDGE, Judge, presiding.

BROWNE & WILEY, JOHN GARLAND, and L. B. OLMSTEAD, for appellants.

H. M. KELLY, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellees, who are the seven children and heirs-at-law of Margaret Donough, a deceased daughter of Thomas Garland and Mary Garland, filed their bill in this case in the circuit court of LaSalle county against the appellants, Katherine Garland and Edward Garland, (the latter in his own right and as administrator of the estate of Mary Garland,) for a partition of real estate owned

by the said Thomas Garland and Mary Garland. The bill was answered and the alleged title of the complainants to a share of the real estate which Mary Garland owned on October 26, 1892, in the real estate of Thomas Garland was disputed, on the ground that Margaret Donough had conveyed her interest in the same to the defendants, Edward Garland and Katherine Garland. The chancellor found against the defendants and entered a decree for partition of all the real estate described in the bill. From that decree this appeal was prosecuted.

Thomas Garland, father of the defendants and grandfather of the complainants, died intestate in 1869, leaving Mary Garland his widow, and Edward Garland, Katherine Garland, Lizzie Garland, Mary Jane Garland and Margaret Garland, (afterward Margaret Donough,) his children and heirs-at-law. He owned three tracts of land, containing about seventy acres. After his death Lizzie Garland died intestate, leaving her mother, brother and sisters her heirs-at-law. Afterward Mary Jane Garland died intestate, leaving her mother, brother and sisters her heirs-at-law. On October 26, 1892, Margaret Donough and John Donough, her husband, executed their quit-claim deed to Edward Garland and Katherine Garland, conveying all interest in the real estate in question, and the deed contained this clause: "Intending to convey all interest that I now have or may hereafter acquire except through the grantees, in and to any lands or real estate of which Thomas Garland died seized or in which said decedent had any interest at the time of his death, and also all lands and real estate the title to which is now in Mary Garland, widow of said decedent, or in which said Mary Garland may have any interest or supposed interest or title in trust for said estate of Thomas Garland, deceased." After the execution of the deed Mary Garland acquired other real estate, but the quit-claim deed was limited to lands which she owned at the time it was made, and it is not

claimed that the deed was effective to release or convey any interest in such real estate. On the other hand, there is no dispute of the claim that Margaret Donough by her quit-claim deed conveyed all interest that she had in the property of which her father, Thomas Garland, was the owner at his death, the title of which had vested in her as his heir or the heir of her sisters, Lizzie Garland and Mary Jane Garland. The question is whether, in addition to the title Margaret Donough then had, she conveyed her expectancy as heir of her mother to the extent of her mother's interest in lands that had descended to her as heir of her deceased daughters, Lizzie Garland and Mary Jane Garland, which on the death of her mother might by operation of law vest in the grandchildren as heirs-at-law of their grandmother.

The expectancy of a prospective heir of a living person may be released to the ancestor or assigned to a stranger. In the case of a release to the ancestor a court of equity will enforce the contract for the benefit of the other heirs, and an assignment or transfer of an expectancy operates in equity as a contract by the assignor to convey the legal estate or interest when it vests in him, which will be enforced in equity when the expectancy has changed into a vested interest. (3 Pomeroy's Eq. Jur. sec. 1287.)

The questions of the right to release or assign an expectancy, and the effect of the release and assignment, have been before the court at different times. In *Bishop v. Davenport*, 58 Ill. 105, a bill was filed for partition, assignment of dower and distribution of the personal estate of Joel Gunter, deceased. There were children of two marriages, and the children of the first marriage had each received \$100 in money or property, except Joel Gunter, Jr., who received \$800, and each gave a receipt in full of his or her share of the father's estate. The complainants offered to bring their advancements into hotchpot, and alleged that Joel Gunter, Jr., was not entitled to any share



of the estate. The court held that the various sums received by the children were not received by way of advancements but were received in full payment and satisfaction of the expectancies of those children who were competent to contract. In *Galbraith v. McLain*, 84 Ill. 379, a bill was filed to enforce the specific performance of a contract made by John Galbraith with his son, Jarrot N. Galbraith, by which the father conveyed to the son fifty acres of land as the son's share of his father's estate. The agreement was by parol but the court enforced the performance of the contract. In *Kershaw v. Kershaw*, 102 Ill. 307, Joseph Kershaw had conveyed lands to his son, John W. Kershaw, and the deed contained a statement that the land was deeded as an advancement out of the estate of the grantor and the deed was accepted by the son as his full and entire share of his father's estate. The circuit court decreed that the land should be brought into hotchpot and valued as unimproved land as of the date of the death of the father. This court reversed the decree, and held that the conveyance was not made as an advancement although it was so stated in the deed, but the property was received as the son's full share of the estate and was binding upon him in favor of the other heirs. In *Longshore v. Longshore*, 200 Ill. 470, the son had accepted a warranty deed from his father of eighty acres of land, and the deed contained an agreement that it was made by the grantor and accepted by the grantee as his full share of the estate of the grantor. It was held to constitute a release of the expectancy of the son as an heir of his father. In *Bolin v. Bolin*, 245 Ill. 613, Nathan W. Bolin accepted a deed from his father in full settlement of his share in the father's estate, and it was held that the contract was sufficient to bar the son from participating in a division of the property.

There have been other cases involving the same principle. In *Parsons v. Ely*, 45 Ill. 232, there was a marriage

settlement in which the intended husband, James A. Parsons, released all his interest in expectancy in the property, real and personal, of his prospective wife, Sarah A. Ely. The wife died leaving one child, and afterward the child died. The husband, James A. Parsons, filed his bill to recover, as the only heir-at-law of the child, the legal title to premises of which his wife was the equitable owner. The court held that the expectancy, although contingent, was a proper subject of contract, and the decree of the court dismissing the bill was affirmed. In *Crum v. Sawyer*, 132 Ill. 443, there was a marriage contract wherein John W. Crum had released to his wife all interest in her estate in the event he should survive her. The wife died, leaving her husband and two uncles her heirs-at-law. The husband filed his bill for partition of the lands between himself and the two uncles, but the court said it was well settled that an assignment or release of the expectancy of an heir would be enforced in equity, after the death of the ancestor, as a right of contract, and that an assignment operates by way of present contract to take effect after, and attach to the things assigned when and as soon as they come into existence. In *Hudnall v. Ham*, 183 Ill. 486, there was a controversy over an ante-nuptial agreement by which the wife had agreed upon a sum in lieu of her rights in the husband's estate, and the court said that contingent interests and expectancies, and things having no present existence but resting only in possibility, may be assigned so as to be binding in equity, and the assignment will be enforced by a court of equity after the subject matter of it has come into existence.

In all of these cases the agreement was between the heir presumptive and the person from whom he would inherit, and the contract was in each case held to constitute a release of the interest of the heir, which was enforced for the benefit of the other heirs. In other cases the expectancy of an heir presumptive has been assigned or con-

veyed to some other person, and in those cases the assignment has been regarded as a contract enforceable in equity against the assignor. In *Hudson v. Hudson*, 222 Ill. 527, John W. Hudson in the lifetime of his father conveyed to his brother, Andrew I. Hudson, his expectancy as an heir of his father, Joel L. Hudson, who executed a will, in which he gave to John W. Hudson and two other sons five dollars each and divided the remainder of his estate among other children. It was held that the conveyance amounted to a sale of the expectancy of John W. Hudson in his father's estate to Andrew I. Hudson. The suit was between the two brothers after the death of the father and the agreement was enforced. There was a different situation in *Thomas v. Miller*, 161 Ill. 60, where the grantor of the expectancy, at the time she made the deed and at her death, had no title. The bill was filed by the widow and administratrix of John A. Thomas, deceased, for the assignment of dower and partition. John A. Thomas was the youngest son of Gideon Thomas, who died leaving a will, in which John A. Thomas was named as the residuary legatee, and in case of his death without leaving heirs of his own the whole was to revert to the heirs of the testator. Lucy Jessop, a daughter of the testator, in 1862 executed a deed to John A. Thomas, in which she and her husband undertook to convey her interest in the lands of which Gideon A. Thomas died seized, to John A. Thomas. Lucy Jessop, the grantor in the deed, died in 1886, and upon the death of John A. Thomas, in 1894, the title to the land became vested, by virtue of the will, in the heirs of Gideon A. Thomas. Lucy Jessop was not living and was not an heir, but her children were, and the title passed to them. As she had no title to the land up to the time of her death nothing passed by the deed. In *Golladay v. Knock*, 235 Ill. 412, William Golladay had made a warranty deed purporting to convey his contingent interest in certain premises. He died before the life tenant and no

title ever vested in him. The court said that a contingent remainder may be conveyed by a warranty deed so as to vest title in the grantee, but where the grantor of such an interest dies before the contingency happens upon which the estate is to vest, nothing passes by such a deed. The court said that had William Golladay survived the life tenant the appellants would have succeeded to his share of the estate and the deed would have been binding upon him and his heirs after his death.

There are some things in the opinion in the case of *Simpson v. Simpson*, 114 Ill. 603, which without a full consideration of the opinion might lead to a wrong conclusion. John Simpson, Sr., had conveyed to his son, Amos P. Simpson, certain lands, and the son had given his father a receipt acknowledging the lands received by him to be in full of all his interest in his father's estate. The son died prior to the death of his father, leaving three children, who claimed an interest in the estate. The superior court of Cook county held the release valid against the heirs of Amos P. Simpson and the Appellate Court reversed the decree. This court held that the release was good against the heirs and the judgment of the Appellate Court was reversed. The court called attention to the statute concerning advancements, which provided that on partition or distribution of an estate the advancement should be brought into hotchpot, and that there was no offer of the grandchildren to return the advancement. While, however, the court treated the conveyance as an advancement, it was said that it was an advancement in full, and the advancement being regarded as one in full, the property conveyed could not come into hotchpot and appellees could not share in the distribution of the estate. Mr. Chief Justice Mulkey filed a separate opinion, saying the grandchildren must take, if at all, *per stirpes*, and consequently their supposed rights were not superior to those of the father if he were living, and that the statute concerning

advancements was merely declaratory of the common law, by which he doubtless meant the law in the absence of a statute, since an expectancy was not transferable at the common law. In *Kershaw v. Kershaw*, *supra*, the court had held that the deed made as a release of the expectancy of the grantee in the grantor's estate was not an advancement although the deed expressly stated that it was, and it is quite evident that a release of an expectancy as heir is not within the terms of sections 4 and 8 of the Statute of Descent, which relate to advancements received by a child or lineal descendant toward his share of the estate. Notwithstanding what was said in *Simpson v. Simpson*, *supra*, concerning the statute and the release as an advancement, the agreement was enforced as a release.

From this review of the decisions it will be apparent that a release by an heir presumptive of his expectancy operates as an extinguishment of the right of inheritance, cutting it off at its source. The line of inheritance is ended by the release made by the one having the expectancy at the time, and the release is binding not only upon him but upon those who take as heirs in his place, otherwise a release would often be ineffective. That would always be the case where the one executing the release does not survive the one to whom the release is made although he has himself received the consideration for the expectancy. If, however, the expectancy is assigned to another, the right of inheritance is not extinguished but still exists, and the assignment is enforced as a contract to convey the legal estate or interest when it ceases to be an expectancy and becomes a vested estate. The assignee is regarded as bargaining for a legal interest depending on a future, uncertain and contingent event. The assignee acquires a right to the legal estate if it ever vests in the assignor, but if it does not, he acquires nothing. In this case Edward Garland and Katherine Garland by the conveyance to them became entitled to enforce in equity a right to an interest in lands

in case the interest should ever vest in Margaret Donough. The estate or interest did not vest in the grantor and the chancellor did not err in his findings and decree.

The decree is affirmed.

*Decree affirmed.*

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JOHN F. THORWORTH *et al.* Plaintiffs in Error, *vs.* JOHN SCHEETS *et al.* Defendants in Error.

*Opinion filed October 27, 1915.*

1. PRACTICE—*effect of motion to dismiss bill for want of equity.* A motion by the defendants to dismiss a bill to enjoin the obstruction of an alleged alley, made at the close of the complainants' evidence, is not considered proper practice, but it amounts to nothing but a submission of the case to the chancellor on the merits.

2. HIGHWAYS—*what necessary to determination of question of highway by prescription.* In order to determine whether an alleged street or alley is a public highway by prescription, it must be decided whether the same has been used by the public as such highway for the period named in the statute.

3. SAME—*effect where proof shows uninterrupted use for the requisite period.* Where the proof shows uninterrupted use by the public of an alleged alley for the period necessary to establish a highway by prescription, the burden is upon the owner of the land to show that such use was under some license, indulgence or special contract inconsistent with a claim of right by the public.

4. SAME—*elements essential to establish highway by prescription.* In order to establish a highway by prescription the public use must be adverse, uninterrupted, continuous, exclusive and under claim of right, but there need be no claim of right in words, nor a declaration that the use is adverse, nor an admission by the land owner that he has knowledge of the adverse claim of right.

5. SAME—*when nature of use and knowledge of the land owner may be inferred.* The nature of the use of land by the public and the knowledge of the land owner of such use may be inferred from the manner, character and frequency of the exercise of the right and from the situation of the parties.

6. SAME—*whether the acts of the public charge notice depends largely upon the circumstances of each case.* The question whether the acts of the public are of such a nature that it will be in-

ferred the land owner has notice of their adverse character depends largely upon the circumstances of each particular case.

7. SAME—*when owner must be presumed to have knowledge of claim of right.* Where the line of travel over an alleged public alley has been substantially the same for half a century, during which time the use by the public has been continuous and uninterrupted, the owner of land over which the alley extends must be held to have knowledge of the claim of right by the public and adjoining owners to use the land as a public highway.

WRIT OF ERROR to the Circuit Court of Kane county;  
the Hon. C. F. IRWIN, Judge, presiding.

J. C. MURPHY, and E. L. LYON, for plaintiffs in error.

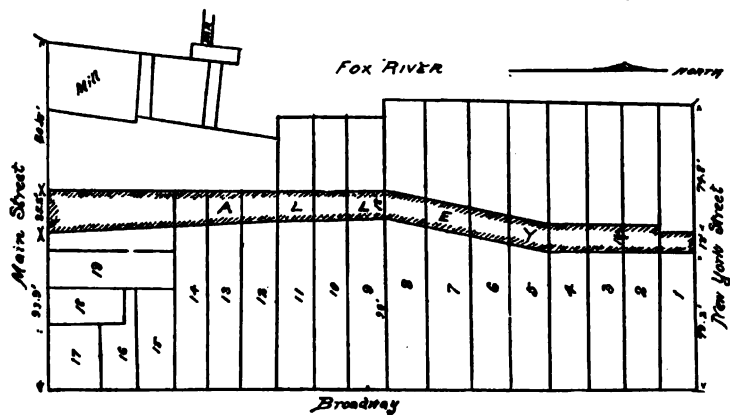
JOHN S. SEARS, and ROY J. SOLIFSBURG, for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill filed by plaintiffs in error in the circuit court of Kane county to enjoin defendants in error from obstructing an alleged alley in the city of Aurora. After a hearing the court dismissed the bill for want of equity. On the case being appealed to this court it was dismissed at the April term, 1915, for want of necessary parties. Thereafter this writ of error was sued out, all the complainants in the bill joining therein.

The strip of land in question which is claimed to be a public alley by prescription extends substantially north and south from New York street to Main street through about the center of block 5 of the original town of Aurora. Since the original platting of block 5 an assessor's survey has been made, and apparently the division into tracts and the location of the buildings still follow substantially the lines of the assessor's survey, and the lots mentioned in this opinion are according to the lot numbers in said survey. For the purpose of a better understanding of the

facts in this case a copy of said survey is given herein, with the side lines of the portion claimed as an alley added:



In order to avoid repetition, the strip claimed to be an alley will be termed in this opinion the "alley."

The evidence discloses that the block in question is located in the principal business portion of Aurora. Plaintiffs in error are the owners of most of the lots over which the alley passes, north of the line of defendants in error's property. Defendants in error own the southwesterly corner of block 5, on which they operate a flour mill, and over their tract the south seventy-five feet of said alley pass. The plat of block 5 does not show any alley dedicated at the time of the platting. When lots 1, 2, 3 and 4 were sold by the then owner, at quite an early day, a strip was reserved across them for use as an alley. No question is raised that the strip reserved for an alley across these four lots does not conform to the alley as claimed here. Nothing is shown in the evidence to indicate that the defendants in error or their grantors had made any objection to the use of this alley by the public or property owners in this block until shortly before this bill was filed, when they built a fence on their own property across the alley about



seventy-five feet north of the north line of Main street. It was to remove this fence that this bill was filed.

At the close of plaintiffs in error's case defendants in error moved to dismiss the bill for want of equity. While this is not considered proper practice, if such a motion is made it amounts to nothing but a submission of the case on the merits to the chancellor. (*Koebel v. Doyle*, 256 Ill. 610.) On the testimony offered by plaintiffs in error the court heard this motion and dismissed the bill for want of equity, entering a decree in accordance with that finding. The chief question in dispute is whether the proof in the record shows that this alley has been established by prescription, especially the south seventy-five feet across defendants in error's property. To settle this question necessitates an examination of the evidence.

The evidence, except in some unimportant details, is undisputed. There is testimony in the record as to the buildings on and use of this block for over seventy years prior to the time of the hearing. The lots facing Broadway were originally occupied by wooden buildings used largely for merchandise purposes and which have been replaced by the brick buildings now located thereon, used for like purposes. On the back of lot 1, facing on New York street, there is a brick building that has been in use for years. On the back of lot 2 is another building, now used for a livery stable. The buildings on the front and back of these two lots and on the front of lots 3 and 4 extend to the alley shown on the plat. Back of the buildings on Broadway from this point to the Hotel Arthur, (on lots 17, 18 and 19, on the southeast corner at Main and Broadway,) until recent years the buildings extended back only eighty feet, and therefore not quite to the east line of the alley as it is shown on the plat. The land between the back of the buildings and the east line of the alley, according to the testimony, was used for loading and unloading merchandise into the buildings, and the wagons of

the merchants, when not in use, frequently stood back of the buildings and teams were tied there. The property between the west line of the alley and the river on all lots between 2 and 9 was used at various times for out-buildings, horse sheds and junk piles, all of which were situated a little way back from the alley. On the back of lots 9, 10 and 11 for many years there have been sheds or barns used in connection with the buildings on the front of the lots. Originally just back of the building on lot 11 there was a platform used for loading and unloading merchandise, which extended towards the east line of the alley about eight feet. On the back part of this lot for some years was a tin-shop. No one took measurements of it, and the testimony as to its size differs largely, some stating it was ten by twelve feet, others that it was larger. It extended east into the alley as it is shown on the plat, about four feet. For years, while it was located there, an overhead bridge extended from the building in front to this tin-shop, apparently being built to allow persons to cross between the store and the tin-shop without interfering with the traffic on the alley below, the bridge being high enough to allow ordinary teams to pass under. Some ten or fifteen years before the hearing, a mail carrier, who testified he drove through there daily with his covered wagon, caught the top of it on the bridge. He complained to the city authorities, and the owners, under the direction of the city, tore the bridge down. The tin-shop ceased to be used as such and was removed years before this hearing. The present owners of lots 9, 10 and 11, some six or eight years ago, extended their buildings twenty feet further back. A platform was also constructed on the back end of these buildings, about four feet wide, for loading and unloading. The barns on the back part of lot 10 had previous to that extended about four feet east of the west line of the present strip claimed as the alley. At the time these buildings were extended the owner of lot 10 cut four feet off the

east end of the barn, so that now the east ends of the barns and sheds on the back ends of lots 9, 10 and 11 extend to the west line of said alley. The alley across these lots is now eighteen feet wide, the platform back of these buildings extending about four feet into it. Lots 12, 13 and 14 have had buildings on them, eighty feet deep, for many years. Between the back ends of these buildings and the east line of said alley is a space of about twenty feet, which has been and is being used for the purpose of loading and unloading merchandise. Back of lot 12 and the north part of lot 13 is located a barn belonging to defendants in error, thirty by twenty-four feet in size. Its east line is the west line of said alley as shown on the plat. Lots 1 to 11, inclusive, run from Broadway to the river, but lots 12, 13 and 14 only run as far back as defendants in error's property. Some twenty years ago the owner of lot 13 built on the back end of his lot, immediately adjoining this barn and in a portion of the alley, a shed, which he used for storing salt in connection with his business. Many of the witnesses testified as to the size of this structure, but as they were relying on their recollection, only, they differed, some placing it as small as six by eight feet and others as large as sixteen by twenty. The weight of the testimony is that it was about ten feet east and west by twelve feet north and south. All the testimony agrees that this shed was only there for a few years and that it was torn down a number of years ago. Defendants in error own all the property extending from the rear ends of lots 19, 14, 13 and 12 to the river. Many years ago on this property a saw-mill and a grist-mill were located. The saw-mill apparently ceased to be used over fifty years ago, but the flour-mill is still in use and has been for over a half century. It is located, as already stated, on the southwest corner of this block. The property between this mill and the west line of said alley has always been unoccupied, except by the barn on the north end of defendants in er-

ror's property and an office about twenty feet square located on Main street and immediately adjoining the west line of said alley shown on the plat. About twenty-five feet east of this office stood for many years, until very recently, a building facing on Main street and adjoining the Hotel Arthur. The evidence tends to show that it was used for an office,—perhaps by defendants in error, as it was located on their property.

The testimony, without contradiction, shows that this alley as shown on the plat has been used for nearly three-quarters of a century as a driveway, not only by the owners of this property but by the public as well, for purposes of ingress and egress to and from the business property situated along Broadway and as a public driveway from New York street to Main street; that this property was also used for this purpose by defendants in error and their immediate and remote grantors; that the alley was thus used without any dispute or question or obstruction of any kind, previous to the building of this fence, except the tin-shop, the salt shed, the overhead bridge and the four-foot extension of the barn on the rear of lot 10; that the only present existing obstruction is the platform on the rear of lots 9, 10 and 11. The testimony is all to the effect that none of these obstructions ever prevented free travel through the alley, although the location of the tin-shop and the salt-shed, while there, caused the travel to jog to the east somewhat, in order to pass through the alley, but every witness who was asked with regard to these obstructions testified positively that these various structures did not interfere with the practical use of the alley. One of the witnesses who had been a United States mail carrier for thirty-six years, testified that during all that time he had driven through the alley, having gone through thousands of times; that he commenced in 1879, when Broadway was not paved, using it then because the alley was a better driveway than the street. He was the witness who

entered the complaint in regard to the overhead bridge which caused it to be torn down under direction of the chief of police. The owners or occupants of the buildings emptied their ashes and garbage into this alley and the city authorities had them removed. The testimony is also to the effect that on a number of occasions the city authorities repaired, with gravel, cinders or ashes, parts of the alley needing repairs. All the witnesses testified that until this dispute arose everyone understood that the alley was a public alley, and had always assumed they were driving over it as a matter of right and not as a matter of permission from any of the property owners. It was testified that the owner of lot 14 at one time talked of building across the alley on his lot, but the owners of the other lots told him he could not do this as it was a public alley, and that as a result of their objection he did not obstruct the alley by building thereon. The testimony is to the effect that the travel in and out of the alley at Main street was between the office building of defendants in error and where the old building was formerly located in the rear of the Hotel Arthur. There is testimony, however, to the effect that between the office building and the mill the property was vacant, and people sometimes drove into the alley by driving over the space between the office building and the mill instead of along the line of the alley as shown in the plat. There can be no dispute on this record as to this being the evidence, the only questions being as to whether there was a sufficiently definite and specific traveled way and whether this use of the south seventy-five feet of this alley was permissive or adverse.

Prescription, as the term is ordinarily employed, some authorities hold, presupposes a grant from the rightful owner. Where the use of a way has continued for the period prescribed by statute or for the period designated by the common law, the authorities usually hold that a right by prescription rests upon the presumption that the

way has been laid out theretofore by competent authority. (1 Elliott on Roads and Streets,—3d ed.—secs. 188, 189.) Whatever the doctrine upon which prescription is based, this court has held that in order to determine whether a road is a public highway by prescription it must be decided whether it has been used by the public as such highway for the period named in the statute. (*Township of Madison v. Gallagher*, 159 Ill. 105; *Village of Peotone v. Illinois Central Railroad Co.* 224 id. 101; see, also, *Doss v. Bunyan*, 262 Ill. 101.) In *City of Chicago v. Borden*, 190 Ill. 430, this court quoted with approval the rule that the public use of land for the period of twenty years as a highway, unexplained, will raise the presumption, without any positive agreement from the land owner, that it was done with his acquiescence, adversely and under a claim of right; and this is the general rule. After an uninterrupted use for the requisite period of enjoyment the owner of the land has the burden of proving that the use of the land was under some license, indulgence or special contract inconsistent with a claim of right by the other party. (*Jones on Easements*, sec. 186.) In order to establish a highway by prescription the public use must be adverse, uninterrupted, continuous, exclusive and under claim of right. (*Illinois Central Railroad Co. v. City of Bloomington*, 167 Ill. 9; *City of Chicago v. Chicago, Rock Island and Pacific Railway Co.* 152 id. 561.) An easement by prescription can be created only by an adverse use of the privilege with the knowledge of the person against whom it is claimed, or by acts so open and exclusive that knowledge will be presumed, exercised under a claim of right, adverse to the owner and acquiesced in by him. Such adverse user must have existed for a period equal at least to the period prescribed by the statute,—now fifteen years. (*Hurd's Stat.* 1913, sec. 139, p. 2147.) There need be no claim of right in words, or a declaration that the use is adverse, or an admission on the part of the land owner that he has knowl-

edge of the adverse claim of right. The nature of the use and the knowledge of the land owner may be inferred from the manner, character and frequency of the exercise of the right and the situation of the parties, and where an actual, uninterrupted use and enjoyment as of right, with knowledge of the other party, is shown to have existed a sufficient length of time to create the presumption of a grant, the presumption that it is a public highway stands as sufficient proof unless it is rebutted by other proof that the use and enjoyment were permissive. (*McCreary v. Boston and Maine Railroad Co.* 153 Mass. 300; *Deerfield v. Connecticut River Railroad Co.* 144 id. 325; Jones on Easements, sec. 164.) Adverse use has been variously defined as use under a claim of right known to the owner of the servient tenement; use such as the owner of an easement would make of it without permission asked or given, or use under claim of right inconsistent with or contrary to the interest of the other party. (22 Am. & Eng. Ency. of Law,—2d ed.—1193, and cases cited.) The user must be confined to a definite and specific line of way, (*City of Chicago v. Galt*, 224 Ill. 421; *O'Connell v. Chicago Terminal Railroad Co.* 184 id. 308;) and the travel by the public must be of such a nature as to indicate a claim of right. (*Town of Brushy Mound v. McClintock*, 150 Ill. 129.) Whether or not the acts of the public are of such a nature that it will be inferred that the owners have either actual or constructive notice must depend very largely on the circumstances of each case.

The testimony of all the witnesses in this record shows that the travel along this alley for nearly a half century has been practically along the same line. One of the witnesses said, in substance: "The line of that travel has never been changed, except possibly a little in the middle of the block. I don't think the wagon tracks over this right of way varied two feet during more than thirty-five years." Another testified that the travel has been along the line

of this alley during all this time with very little variation. Another witness testified that ninety-eight per cent of the travel across this block from New York street and Main street was within the boundary lines of this alley as shown on the plat. All the witnesses who testified on this subject agreed substantially on this question and there is no testimony in the record in any way contradictory. There is very little evidence in the record that furnishes any fair basis for the argument of counsel for defendants in error that the travel between Main and New York streets across block 5 was outside of the boundary lines of the tract claimed as the alley. It is evident from the testimony that whatever traveling was done outside of those lines was largely, if not entirely, due to driving teams to or from the rear of the various business places or to or from the mill of defendants in error or the barns or sheds at the rear of the lots. The use of this alley was so open and notorious that it must be presumed, on this record, that the defendants in error had knowledge of the claim of right by the parties owning property adjoining said alley and by the public generally. (*Smith v. Roath*, 238 Ill. 247.) As was said by this court in *City of Chicago v. Sawyer*, 166 Ill. 290, where it was held that an alley was established by prescription by twenty years' adverse user, "the use was actual, open and uninterrupted for more than twenty years, and everyone who saw fit exercised the right" to travel over it. Use was made not only by the property owners immediately adjoining it but by the public generally, and the public authorities, when necessary, made slight repairs to keep it in condition to travel over, and the use was sufficient to create an easement by prescription.

The mere fact that years ago obstructions were placed in other parts of the alley, which did not seriously interfere with travel back and forth through it, would in no way lessen the claim of right in the public to the south seventy-five feet of the alley in question. It is plain from



the record that it was never understood that these obstructions were placed there as a matter of right but that they were permitted rather on sufferance, and never seriously interfered with the use of the passageway for the purpose for which it was intended. Such obstructions in no way negative the right of an easement by prescription. *Smith v. Roath, supra*.

The decree of the circuit court will be reversed and the cause remanded, with directions to that court to enter a decree in accordance with the views herein set forth.

*Reversed and remanded, with directions.*

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CHARLES B. KETCHAM *et al.* Appellees, *vs.* LEWIS Y. KETCHAM, SR., Appellant.

*Opinion filed October 27, 1915.*

1. HOMESTEAD—*when leasing homestead is not abandoning it.* One does not abandon or lose his right of homestead by leasing the premises so long as he occupies a part of it as a homestead.

2. SAME—*when homestead is not abandoned though dwelling is destroyed by fire.* One who leaves the homestead premises because the dwelling has been destroyed by fire but never acquires another homestead and always claims a residence and votes in the township in which the homestead premises are situated, cannot be said to have abandoned his homestead right in the premises.

3. SAME—*when a householder need not account for insurance money.* A householder who occupies the homestead premises before allotment and improves the same has an insurable interest in the dwelling, and if it is destroyed by fire he is not required to account for the insurance money as part of the value of the homestead in a subsequent proceeding by the heirs for partition.

4. SAME—*section 7 of Exemptions act, as to homestead insurance, construed.* Section 7 of the Exemptions act, which provides that the insurance money on homestead buildings destroyed by fire shall be exempt to the same extent the buildings would have been, does not make the money received from the destruction of the dwelling, before homestead is allotted, a part of the realty, but means that the money shall be exempt from attachment or garnishment, subject to the rules governing the homestead.

5. *SAME—value of homestead premises to be determined as of the time of allotment.* If the homestead premises are worth more than \$1000 the surviving husband or wife and the heirs hold the estate as tenants in common until the homestead is allotted, and the fact that the parties neglect to have the homestead allotted until after the dwelling is destroyed by fire does not change the rule that the value of the premises is to be determined as of the time of the allotment.

APPEAL from the Circuit Court of Fulton county; the Hon. GEORGE W. THOMPSON, Judge, presiding.

A. E. TAFF, for appellant.

JESSE HEYLIN, and FLOYD F. PUTNAM, guardian *ad litem*, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Appellees, Charles B. Ketcham and others, filed a bill in chancery in the circuit court of Fulton county for partition of a tract of land of about nine acres situated in that county. They are heirs-at-law or claim under the heirs-at-law of Emma Ketcham, deceased. From the pleadings and proofs it appears that on May 15, 1902, the said Emma Ketcham died seized of the real estate in controversy, leaving her surviving the appellant, Lewis Y. Ketcham, Sr., her husband, and four children. Since her death one of the children has died, leaving a widow and four children, two of whom are minors. At the time of Mrs. Ketcham's death she and her husband were residing in the dwelling house on the premises. After her death the appellant leased the premises to a tenant, with whom he continued to reside in the dwelling house until the same was destroyed by fire, on September 13, 1912. After the residence was destroyed appellant took up his residence with a neighbor within a few rods of the premises, where he resided until in July, 1913, at which time he moved to the city of Canton, where he has since resided with a relative. He is

seventy-one years of age, and never at any time intended to abandon the premises or relinquish his homestead rights therein. Some years before the death of Mrs. Ketcham he made repairs and improvements on the dwelling house on the premises to the extent of about \$500, and insured the dwelling house in his name for \$700 in the Lewistown Mutual Insurance Company. The amount expended on the dwelling was not derived from the land but was pension money received by him from the government. He paid all the premiums on the insurance, and after the destruction of the house by fire he collected the full amount of the policy. Ever since the death of his wife he has rented the property and collected the rents from the same, paid all taxes and assessments levied against it, and kept up the interest on a mortgage indebtedness of \$200 on the premises. His homestead in the premises was never set off to him nor was his dower ever assigned.

The cause was referred to the master in chancery to take the proofs and report the evidence, together with his conclusions as to the law and the facts. Evidence was heard and the master made his report, finding, among other things, that at the time of the death of Mrs. Ketcham she and appellant resided on and occupied the premises as a homestead; that after her death appellant continued to occupy the premises as a homestead until the destruction of the dwelling by fire, and that since the fire he has held possession of the premises and collected the rents, issues and profits therefrom; that he has never surrendered or abandoned his homestead rights therein and was entitled to homestead in the premises; that the aggregate amount received from rents, over and above the amount paid out for taxes, interest, etc., was \$559.10, for which amount he should account in this proceeding; that he has collected \$700 insurance on the dwelling on the premises, and that he should not be required to account for any portion of such insurance money.

Appellees filed objections to the master's finding, which were overruled and ordered to stand as exceptions in the circuit court. Appellant filed no objections before the master and no exceptions in the circuit court. Among the exceptions filed to the master's report by appellees was one to the finding that appellant was entitled to a homestead in the premises, and another to the finding that appellant should not be required to account for, as a part of his homestead, the \$700 received from the insurance company. The court overruled the exception to the finding that appellant was entitled to a homestead and sustained the exception to that part of the report wherein the master found that appellant should not be required to account for the insurance collected as a part of his homestead. The court entered a decree ordering partition of the premises and directing that a homestead of the value of \$300 be set off to appellant, found that he was entitled to dower, but made no finding and no order with reference to the matter of the rents received and retained by him. From this decree appellant has prosecuted his appeal to this court, and assigns as error that part of the decree requiring him to account for the insurance collected, as a part of his homestead. Appellees assign as cross-error the overruling of their exception to the finding that appellant is entitled to a homestead in the premises and the omission to make directions as to the disposition of the money collected by appellant as rents.

Appellees insist that appellant abandoned his homestead, because the evidence shows that the land was under lease and because appellant ceased to reside thereon after the destruction of the dwelling by fire. As to the question of abandonment because of the leasing, the law is well settled that one does not abandon or lose his right of homestead by leasing the premises so long as he occupies a part of it as his homestead. (21 Cyc. 610, 611.) That was the situation presented here so long as the premises were hab-

itable. On the question of abandonment because appellant failed to continue to reside thereon after the destruction of the dwelling house, we think the evidence wholly fails to show an intention on the part of appellant to abandon his homestead. The question of abandonment of the homestead is very largely one of intention, to be determined on the particular facts and circumstances of each case. (21 Cyc. 603, 604; *McBride v. Hawthorne*, 268 Ill. 456.) In the case of *Howard v. Logan*, 81 Ill. 383, in which the facts were somewhat similar to those in the case at bar, it was held that where a house occupied by the owner with his family as a homestead is destroyed by fire and he makes preparations to re-build upon the same ground, and never acquires another homestead or abandons the intention of again occupying the same premises as a homestead until he sells the same, the vendor could claim his homestead rights therein. In this case the evidence shows that appellant had no intention of leaving the homestead so long as the same was habitable, and that his removal therefrom was necessitated by the destruction of the dwelling, in which he had lived up to that time. His removal was involuntary. It was made necessary by circumstances over which he had no control. He was prevented from living on the premises for want of a house in which to live. He retained a residence thereon after the destruction of the dwelling in so far as circumstances would permit, visited the premises almost daily, and always claimed a residence and voted in the township in which the same were situated and claimed the property in controversy as his homestead. Under these circumstances we think the court did not err in holding that appellant had not abandoned his homestead and had a homestead right in the premises. (21 Cyc. 600.)

As to the insurance money, at the time the dwelling house was destroyed appellant's homestead had not been set off or allotted to him. The contract between him and the insurance company was a personal one of indemnity

and did not run with the land or the property situated on the land. (19 Cyc. 883.) Section 7 of chapter 52 of our statutes has no bearing upon this question. It does not make the money received from the destruction of the dwelling before the homestead is allotted a part of the realty. It provides: "Whenever a building, exempted as a homestead, is insured in favor of the person entitled to the exemption, and a loss occurs, entitling such person to the insurance, such insurance money shall be exempt to the same extent as the building would have been had it not been destroyed." This statute has no application to the case at bar. It only applies when the question arises between debtor and creditor after the homestead has been allotted or before the homestead has been allotted, where the value of the whole tract does not exceed \$1000,—the value of the homestead interest. What is meant by it is, that the insurance money shall be exempt from attachment, garnishment or other process, the same as the homestead premises would be exempt from levy and sale on execution had they not been destroyed, and that such insurance money is exempt from garnishment and attachment, the same as the proceeds of the sale of a homestead are exempt for one year, as provided by section 6 of chapter 52.

It is the contention of counsel for appellees, and was evidently the theory of the trial court, that appellant was only entitled to a homestead of the value of \$1000, and he having received \$700 proceeds of insurance money, that amount should be applied on his entire homestead interest in the premises. But we do not think this position is tenable. Suppose the person entitled to homestead in premises enters before or after the allotment of such homestead, insures his interest for the full value of the homestead to which he is entitled, viz., \$1000, and in the event of loss by fire collects that amount. Could it be said that under our homestead laws, such homesteader having received from the premises the value of a homestead in money, his

homestead rights would be thereby extinguished? Appellant had an insurable interest in the premises, (*Rockford Ins. Co. v. Nelson*, 65 Ill. 415,) and if the insurance company saw fit to issue him a policy of insurance and accept the premiums paid by him and pay him the entire amount of the insurance in case of loss, which it did, that was a matter entirely between appellant and the insurance company and should not be taken into consideration in this case in making an allotment of a homestead. Any one of the appellees, as well as the appellant, they being tenants in common, had an insurable interest in the property. Suppose one of the appellees had induced some insurance company to insure his interest for any amount, had paid the premiums and in case of loss had succeeded in collecting the entire amount of the insurance; could it be said, if a bill for partition were subsequently filed, that he should be charged with the amount that he had individually received by reason of such insurance? The insurance money received by appellant was a thing apart from his homestead interest or the interest of any of appellees in the premises and cannot be taken into consideration in this case. A homestead, under the present law, is an estate in land. It is a freehold. In *Hammer v. Johnson*, 44 Ill. 192, it was held that the owner of an undivided interest in property who procures insurance to protect his own interest cannot be compelled to account to his co-tenant in case of loss by fire. In *Harrison v. Pepper*, 166 Mass. 288, (33 L. R. A. 239,) it was held that a life tenant is not required to use the proceeds of insurance obtained by him on a total loss of the buildings insured in his own interest for their full value in re-building on the premises, and cannot be held accountable to the remainder-men for such money even if it amounts to more than the value of the life tenant's interest.

There is another reason why the money received from insurance should not be taken into consideration. Where the estate in which the homestead exists exceeds \$1000 in

value, the widow and heirs hold the estate as tenants in common until the homestead is assigned or allotted to her, (*Garwood v. Garwood*, 244 Ill. 580; *Mason v. Truitt*, 257 id. 18;) and when it is allotted, its value is to be determined as of the time of the allotment. (*Mason v. Truitt*, *supra*; *Anderson v. Smith*, 159 Ill. 93; *Jespersen v. Mech*, 213 id. 488.) Appellees, as well as appellant, had a right to have a homestead set off to appellant and its limits defined at any time after the death of Mrs. Ketcham. They neglected to do that, and the fact that the property has since depreciated in value does not change the rule as to when that value is to be ascertained, under the uniform holdings of this court. *Garwood v. Garwood*, *supra*.

We think the court erred in deducting from the amount of appellant's homestead interest the amount received by him from the insurance because of the destruction of the building on the premises.

As to the cross-error assigned that the court did not find that appellant should be charged with the fair rental of the premises, exclusive of homestead, since the death of Mrs. Ketcham, that question is not properly raised by this record. All the present decree does is to determine whether or not the premises shall be partitioned and the interest of each party in the premises so to be partitioned. This the decree does. The question as to the accounting for the rents and profits received by appellant is not properly raised at this time but is a matter for adjustment in the final decree. That appellant should account for any excess of rent received over and above his interest in the premises and the amount paid out on account of taxes, interest, repairs, etc., does not seem to have been a controverted question in the lower court, and we have no doubt that such matters will be properly disposed of at the proper time.

For the error indicated, the decree must be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*



WILLIAM O'BRIEN, Defendant in Error, vs. THE ESTATE  
OF JOHANNA RHEMBE, Deceased, Plaintiff in Error.

*Opinion filed October 27, 1915.*

**WILLS**—*what does not preclude probate of will.* Where a will contains a full and formal attestation clause, the signature to the will is shown to be in the handwriting of the testatrix and the subscribing witnesses went at the request of the testatrix to witness her will and signed as witnesses a paper they understood was the will, the fact that they do not remember seeing the testatrix sign the will or that she acknowledged it to be her act and deed does not preclude the probate of the will.

WRIT OF ERROR to the Circuit Court of Cook county;  
the Hon. JOHN McNUTT, Judge, presiding.

JAMES J. LEAHY, (ALBERT O. OLSON, of counsel,) for  
plaintiff in error.

HUGO M. FRIEND, and FREDERICK DEISER, for defend-  
ant in error.

Mr. CHIEF JUSTICE FARMER delivered the opinion of  
the court:

This case comes to this court by writ of error to review the judgment of the circuit court of Cook county admitting to probate the will of Johanna Rhembe, deceased, heard there on appeal from the probate court of said county.

Johanna Rhembe, a widow, died testate September 14, 1913, leaving as her children and only heirs-at-law, Joseph McCabe, Michael McCabe and Anastasia Palmquist. Her will purports to have been executed July 24, 1912. She left a small amount of money in bank and a lot in Evanston, which is said in the brief of plaintiff in error to be worth \$1500 and in the petition for letters testamentary is valued at \$500. She was a working woman, sometimes employed as a domestic servant in families, but the greater part of

the time was employed in house cleaning, window washing, etc. Both her sons were married and living by themselves. The daughter, Anastasia Palmquist, had been married but her husband had deserted her, and at the time the will was made, and for some time before, she was an inmate of the insane asylum at Dunning. The will, after directing payment of testatrix's debts and funeral expenses, devised and bequeathed all the real and personal property of testatrix to William O'Brien, referred to in the will as "my good friend William O'Brien, who has befriended me many times." O'Brien was also designated as executor without bond. He made application to the probate court of Cook county for the admission of the will to probate and for letters testamentary. The admission of the will to probate was resisted by the heirs of testatrix, and after a hearing said court denied the probate of the will on the ground that it was not executed in accordance with the requirements of the statute. The proponent of the will appealed to the circuit court, where a hearing was had and a judgment entered admitting the will to probate.

The will was witnessed by Mrs. Jennie Gustafson and Miss Anna M. Forsberg. They were the only witnesses heard in the probate court upon the application to admit the will to probate. At the hearing on the appeal to the circuit court it was competent to, and the court did, hear the testimony of other witnesses than the witnesses to the will, both upon the question as to its due execution and the testamentary capacity of testatrix at the time the will was made.

Plaintiff in error contends that the proof was not sufficient to establish the due execution of the will (1) because it was not proved the will was signed by the testatrix or by someone in her presence and under her direction; (2) that it was not duly acknowledged by the testatrix to be her act and deed; and (3) that the testimony of the subscribing witnesses and that of the other witnesses offered

to prove the testamentary capacity of the testatrix was insufficient.

The testatrix was between fifty-eight and sixty years of age and lived alone when not living with families for whom she worked. She appears to have been quite well acquainted with Anna M. Forsberg, one of the witnesses to her will and who worked as a domestic servant in Evanston. She also appears to have known the other subscribing witness, Jennie Gustafson, who was an intimate friend of Miss Forsberg. About two days before the will purports to have been executed the testatrix called up Miss Forsberg and asked her if she would witness testatrix's will, and also requested her to ask Mrs. Gustafson to act as a witness to her will, stating at the time she would call her (Miss Forsberg) when she was ready to execute her will. On the morning of July 24, 1912, the testatrix called Miss Forsberg and requested her to get Mrs. Gustafson and come to the testatrix's home that evening and go with her just across the street to the home of one O'Connor, who was a justice of the peace, to witness her will. That evening the two witnesses went to where testatrix was living and together the three went to O'Connor's. Mrs. Gustafson testified to going to the testatrix's home that evening with Miss Forsberg, who told her testatrix wanted her to come and act as a witness to her will. Together the three of them went to O'Connor's. The testatrix said she was going to have the witness sign the will. When they arrived at O'Connor's house he said to the parties they were late and that he thought they were not coming. It was then nearly nine o'clock. A paper was produced by O'Connor and witness signed her name to it. It was folded so she could not see anything written above her name. When O'Connor produced the paper he said something but the witness could not remember what it was. The testatrix did not say anything at O'Connor's house about the will or there request the witness to sign it. The parties were at

O'Connor's house only a little while,—not more than ten minutes. After the witness signed the will Miss Forsberg signed it also. There was no substantial difference between Miss Forsberg's testimony about what occurred at the time they signed the will and the testimony of Mrs. Gustafson. Neither of them remembered seeing the testatrix sign her name to the will or that she there acknowledged it to be her act and deed.

The statute requires a will to be signed by the testator or testatrix or by someone in his or her presence and by his or her direction, and that it be attested in the presence of the testator or testatrix by two or more credible witnesses, two of whom, upon the application to probate the will, shall declare on oath that they saw the testator or testatrix sign it in their presence or that such testator or testatrix acknowledged it to be his or her act and deed. It is claimed by plaintiff in error the testimony of the subscribing witnesses failed to show a compliance with these requirements of the statute, namely, that the will was signed by the testatrix or by someone in her presence and by her direction, or that she acknowledged it to be her act and deed. On the question whether or not the will was signed by the testatrix, the paying teller of the bank where the testatrix kept her account was produced as a witness to prove the name of testatrix on the will was in her handwriting. The witness testified he had known testatrix about five years, had seen her sign her name and knew her signature, and that the signature to the will looked like that of testatrix. There was a full attestation clause written out just above the signatures of the subscribing witnesses, which recited that on the day of the date of the instrument it was declared by testatrix to be her last will and testament in the presence of the witnesses, who at her request and in her presence and in the presence of each other subscribed their names thereto as witnesses. The subscribing witnesses to the will were requested by the testatrix to come to her

home the evening of the execution of the will for the purpose of going with her to O'Connor's house to act as witnesses to her will. They went to her home and accompanied her to O'Connor's house for that purpose at her request, and there signed a document which they understood to be her will but which they did not read nor did they see enough of what was written on the paper to know what it was, nor was it necessary that they should. O'Connor died before the application was made for the probate of the will. Clearly, what the witnesses did there they did at the request of the testatrix. They do not remember having seen her sign her name or that she said the signature to the will was hers, but the only reasonable conclusion that can be drawn from the testimony of the bank teller and other facts and circumstances testified to by the subscribing witnesses is that the signature to the will was testatrix's. Cases involving this question, as well as the proof necessary to establish the acknowledgment of testatrix that the instrument was her act and deed, have often been before this court, and the ground has been so thoroughly covered by the decisions that we can add nothing new upon the subject and will merely cite some of the authorities which are controlling in support of the due execution of the will: *Hobart v. Hobart*, 154 Ill. 610; *Gould v. Theological Seminary*, 189 id. 282; *In re Estate of Kohley*, 200 id. 189; *Mead v. Trustees Presbyterian Church*, 229 id. 526.

Upon the question of the testamentary capacity of testatrix we are of opinion no other conclusion could have been reasonably arrived at than that the testatrix had sufficient mental capacity to make a valid will.

The judgment of the circuit court is affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* P. J. Lucey, Attorney General, Petitioner, *vs.* GEORGE KERSTEN, Judge, etc., Respondent.

*Opinion filed October 27, 1915.*

1. MANDAMUS—*petition on relation of Attorney General need not make State's attorney a party.* A petition for *mandamus* on the relation of the Attorney General to compel a circuit judge to enter an order remanding a convicted prisoner to the custody of the warden of the penitentiary need not make the State's attorney a party, even though the prisoner was removed from the warden's custody on a petition for a writ of *habeas corpus ad testificandum* presented by the State's attorney, as the Attorney General is the chief law officer of the State and the object of the *mandamus* petition is to conserve the rights of the people.

2. SAME—*what question cannot be considered on petition for mandamus.* On petition for *mandamus* on the relation of the Attorney General to compel a circuit judge to enter an order remanding to the custody of the warden of the penitentiary a convicted prisoner who has been taken from such custody on a petition for a writ of *habeas corpus ad testificandum*, the question whether such writ was improvidently issued cannot be considered, as that question is a matter personal to the warden and can only be raised by him upon a motion to quash the writ.

3. HABEAS CORPUS—*circuit court has no power to take a convicted prisoner from custody of the warden.* A circuit court has power, under the statute, to issue a writ of *habeas corpus ad testificandum* where the testimony of a prisoner in the penitentiary is required, but it is the duty of the warden, in producing the prisoner in answer to the writ, to retain the custody of him and return him to the penitentiary upon the conclusion of his testimony, and the circuit court has no power to make an order transferring the custody of the prisoner to the sheriff.

4. PRACTICE—*when effect of a writ of mandamus is to expunge void order.* The fact that the order entered by the circuit court transferring a convicted prisoner from the custody of the warden of the penitentiary to the sheriff is void does not preclude the Supreme Court from issuing a writ of *mandamus* to compel the circuit court to enter an order remanding the prisoner to the custody of the warden, as the effect of the writ is to expunge a void order of the court, which is a proper office of the writ.

ORIGINAL petition for *mandamus*.

P. J. LUCEY, Attorney General, (THOMAS J. O'HARE, of counsel,) for petitioner.

MACLAY HOYNE, State's Attorney, (FRANCIS E. HINCKLEY, of counsel,) for respondent.

Mr. JUSTICE COOKE delivered the opinion of the court:

At the April term, 1915, this petition was filed by leave of court, praying for a writ of *mandamus* against the respondent, George Kersten, judge of the circuit court of Cook county and *ex-officio* judge of the criminal court of Cook county, commanding him forthwith to enter an order in a case pending in the criminal court of Cook county entitled People of the State of Illinois *ex rel.* Maclay Hoyne vs. Edmund M. Allen, warden of the penitentiary of the State of Illinois, remanding Nathan Steinberg to the custody of the said warden. The petition alleges that at the September term, 1912, of the criminal court of Cook county Nathan Steinberg was convicted of the crime of burglary and was sentenced to the penitentiary at Joliet, where he was confined, pursuant to such sentence, from September 24, 1912, until December 21, 1914; that upon the latter date there was presented to respondent, who was then presiding as one of the judges of the criminal court of Cook county, a petition by the People, on the relation of Maclay Hoyne, State's attorney, against Edmund M. Allen, warden of the penitentiary, for the writ of *habeas corpus ad testificandum*, commanding the warden to produce said Steinberg in the criminal court of Cook county to testify in a certain cause then pending before the grand jury of said court; that the writ was issued and Steinberg produced accordingly before said criminal court; that respondent, as such presiding judge, on December 22, 1914, entered an order in that cause transferring the custody of said Steinberg from the warden of the penitentiary to the sheriff of Cook county until the further order of the court; that the

life of the grand jury before whom Steinberg was brought up to testify having expired, the Attorney General made application to respondent to remand Steinberg to the custody of the warden of the penitentiary; that the hearing on this application was from time to time delayed until March 31, 1915; that on that date the State's attorney appeared and presented an affidavit setting up that the presence of Steinberg was necessary in the city of Chicago in order that the State's attorney might consult with him in reference to the prosecution of the case of *The People vs. James O. Storen et al.*; that the relator objected to the consideration of the affidavit but the court considered the same, and it was then stipulated by and between the relator and the State's attorney that the records of the county jail of Cook county showed that Steinberg had not left the jail to testify before the grand jury or before any court between February 26, 1915, and March 31, 1915; that prior to February 26, 1915, Steinberg had been outside the jail on nineteen different days on various missions, and that the respondent thereupon refused to remand Steinberg to the custody of the warden of the penitentiary.

To the petition the respondent interposed a general and special demurrer and the cause was submitted on the demurrer. The grounds of demurrer which are relied upon here are, that the State's attorney is a necessary party and should be given an opportunity to plead; that the writ will not issue to correct a void order of court, and that the action sought to be coerced is a judicial and discretionary action of the court, which cannot be compelled by *mandamus*.

This petition is presented by the People on the relation of the Attorney General, the chief law officer of the State. It is incumbent upon the Attorney General, and the State's attorney as well, to protect the interests of the people, and it would indeed be a novel situation which would require the State's attorney to be made a party defendant in a suit



brought by the Attorney General to conserve the rights of the people. Should the writ issue, it would command the action only of the respondent and would require nothing to be done on the part of the State's attorney.

Petitioner contends that a judge of the criminal court of Cook county has no power to issue the writ of *habeas corpus ad testificandum* to produce a witness to testify before the grand jury, and that before such a writ is issued the judge or court before whom the application is made should first require that notice of the application be given to the Attorney General, as representing the warden of the penitentiary. It is also contended that the writ should not issue except upon a sworn petition and a strict showing of the materiality of the testimony and the necessity of the presence of the prisoner. These are all matters going to the propriety of the issuance of the writ. In this particular case, under this petition, it is not proper to inquire whether the writ was improvidently issued, as that is a matter personal to the warden and is a question which could only be raised by him upon a motion to quash the writ. He has responded to the writ without questioning its sufficiency, and the only matter presented for determination is whether, the prisoner having been taken from the custody of the warden by order of the court, the respondent should be commanded to enter an order restoring the prisoner to the custody of the warden.

Our statute provides that the several courts having authority to issue writs of *habeas corpus* may issue the same when necessary to bring before them any prisoner to testify, and that after any such prisoner shall have given his testimony he shall be returned to the jail or other place of confinement whence he was taken for the purpose of testifying. (Hurd's Stat. 1913, secs. 34, 35, p. 1352.) As the criminal court of Cook county has authority to issue writs of *habeas corpus*, the respondent clearly had jurisdiction to issue the writ of *habeas corpus ad testificandum* un-

der the statute. Respondent, however, was without power to enter an order taking the prisoner from the custody of the warden and placing him in the custody of the sheriff of Cook county. The issuance of a writ of *habeas corpus ad testificandum* does not have the effect of taking the prisoner out of the custody of the officer in whose charge he is, and in this case it was the duty of the warden, in producing Steinberg in answer to the writ, to retain custody of him and to return him to the penitentiary immediately upon the conclusion of his testimony. Under the common law an officer thus having the custody of a prisoner was held to a strict accountability in producing such prisoner in response to a writ of *habeas corpus ad testificandum* and in returning him to the place of confinement. If, in going to and from the place where the testimony was to be taken, the officer traveled an unreasonable, circuitous route, or if he delayed the return of the prisoner to the place of confinement after the testimony had been completed, he was held liable for an escape. Our statute does not contemplate that any of these restrictions shall be in the least relaxed. While courts have the power to require the production of prisoners as witnesses when the same may be necessary, the duty devolves upon the officer who has such prisoner in custody to see that his removal from the place of confinement to the court where his presence is required, and his return, are accomplished as expeditiously as possible.

Respondent was represented upon the hearing of this petition by the State's attorney of Cook county, who admitted, upon oral argument, that the order entered by respondent transferring the custody of Steinberg from the warden to the sheriff of Cook county was void and that respondent had no power to enter such an order. He then contended that theoretically the prisoner has been all the time in the custody of the warden, and as the order of the court transferring the custody of the prisoner was void there is no occasion for an order remanding the prisoner

to the custody of the warden. The order entered by the court was unquestionably void. The entry of a void order, however, may be required to be expunged by *mandamus*, (*People v. Petit*, 266 Ill. 628,) and a writ commanding respondent to enter the order remanding the prisoner to the custody of the warden would be, in effect, requiring the respondent to expunge the order transferring the custody of the prisoner from the warden to the sheriff. As the records of the criminal court stand, there is an order there transferring the custody of Steinberg to the sheriff, and he is, in fact, actually in the custody of the sheriff.

While the warden may have been at fault in turning over the custody of his prisoner to the sheriff, the void order of the court should not be allowed to remain as an obstacle to prevent him from speedily returning his prisoner to the penitentiary.

The demurrer is overruled and the writ awarded as prayed.

*Writ awarded.*

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THE PEOPLE *ex rel.* F. W. Matthiessen *et al.* Appellants, *vs.* C. B. LIHME, Appellee.—THE PEOPLE *ex rel.* F. W. Matthiessen *et al.* Appellants, *vs.* C. DIESTERWEG, Appellee.

*Opinion filed October 27, 1915.*

This case is controlled by the decision in the case of *People v. Lihme*, (*ante*, p. 351.)

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. JOE A. DAVIS, Judge, presiding.

GEORGE WILEY, State's Attorney, WILLIAM J. CALHOUN, and M. F. GALLAGHER, (EARL B. WILKINSON, of counsel,) for appellants.

MONTGOMERY, HART, SMITH & STEERE, (CHARLES S. CUTTING, LOUIS E. HART, and NORMAN H. PRITCHARD, of counsel,) for appellees.

Mr. JUSTICE DUNN delivered the opinion of the court:

The question in these two cases is the same as the question in the case of *People v. Lihme*, (*ante*, p. 351.)

The LaSalle and Bureau County Railroad Company was organized under the general Incorporation law for railroad companies in this State. Since its organization its stock, like that of the Matthiessen & Hegeler Zinc Company stock, has been equally divided between Edward C. Hegeler and members of his family and F. W. Matthiessen and members of his family, except four shares issued to other persons by agreement of Hegeler and Matthiessen. At the time of his death Edward C. Hegeler owned 248 shares of stock. He provided in his will for the same disposition of the stock in the railroad company as in the zinc company, all being held in trust under identically the same provisions. C. B. Lihme and C. Diesterweg were elected directors of the railroad company, each being the owner of a share of the Hegeler stock assigned to them, respectively, for the purpose of qualifying them as directors of the railroad company. These cases are informations in the nature of *quo warranto* filed against them, respectively, in which judgments of ouster were rendered by the circuit court. The judgments were reversed in the Appellate Court and final judgments were rendered there. Certificates of importance were granted and appeals allowed to this court.

Following the decision of *People v. Lihme*, *supra*, the judgments of the Appellate Court will be affirmed.

*Judgments affirmed.*

N. B. LEE *et al.* Appellants, *vs.* THE CITY OF CASEY *et al.*  
Appellees.

*Opinion filed October 27, 1915.*

1. PRACTICE—*when separate order granting leave for new parties to join as complainants is unnecessary.* Where the complainant in a bill filed by him in his capacity as a tax-payer files a petition stating that certain other tax-payers desire to join with him as complainants and that they have prepared an amended and supplemental bill which they ask leave to file, the granting of leave to file the supplemental bill includes leave for the parties to join as complainants and no separate order is necessary.

2. SAME—*when the original complainant cannot dismiss suit to prejudice of others.* Where a bill is brought by the complainant in his capacity as a tax-payer to enjoin the collection of certain taxes, other tax-payers who are permitted to become complainants acquire an interest in the subject matter of the suit and the original complainant cannot thereafter abandon or discontinue the suit without their consent, and the fact that the suit is dismissed as to the original complainant and part of the new ones does not have the effect of dismissing the suit as to others not consenting.

APPEAL from the Circuit Court of Clark county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding.

JOHN J. ARNEY, for appellants.

GRAHAM & SNAVELY, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

Hugh T. Bragg and John Carr, as tax-payers and on behalf of themselves and all others similarly situated, filed their bill at the November term, 1912, of the circuit court of Clark county, against the city of Casey and other defendants, to enjoin the levy and collection of certain taxes which the bill alleged were illegal. At that term of court the bill was dismissed as to John Carr. At the July term, 1913, Bragg filed a petition stating that other tax-payers of the city of Casey, including N. B. Lee, William H.

Schmoyer and C. B. Orsborn, the appellants, desired to join with him as co-complainants; that he, together with the other parties named in the petition, had prepared an amended and supplemental bill in which said parties were joined as co-complainants, and asking leave to file such amended and supplemental bill. Leave was granted and the amended and supplemental bill was filed. To this bill defendants interposed a demurrer, which was overruled. The bill was then answered and the cause referred to the master in chancery. On the last day of the November term, 1914, Bragg and all the others who were made co-complainants by the amended and supplemental bill except appellants asked that the suit be dismissed as to them, and an order dismissing the suit as to those complainants was entered. During vacation, between the November and the April terms, appellees filed a motion to dismiss the cause *nunc pro tunc* as of the 13th of November, being the date of the dismissal as to Bragg and the other complainants, for the reason that the order entered at that time dismissing the cause as to Bragg, the only remaining original complainant, was, in effect, a final dismissal and termination of the suit. Upon the convening of the April term this motion was allowed and the cause dismissed *nunc pro tunc* as of November 13, 1914. This appeal has been perfected to review that action of the court.

The appellees have filed a motion to dismiss the appeal for the reason that there were seven complainants in the cause at the time it was dismissed, that a joint appeal was prayed and allowed, and that only three of the complainants, the appellants here, executed the appeal bond and joined in the appeal. This motion was taken with the case. The theory upon which this motion is made is, that the suit was, in fact, dismissed upon the dismissal of Bragg, the only remaining original complainant, on November 13, 1914, and as it involves a determination of

the main question presented for review by this appeal it will not be treated or discussed separately.

It is contended on the part of the appellees that no order of court was ever entered granting leave for new parties to join as co-complainants. While it is true that the record does not disclose that any separate and specific order was entered allowing appellants and the other additional co-complainants to join, the petition of Bragg set up that they desired to join as co-complainants and asked that they be permitted to do so. It also alleged that the amended and supplemental bill making the appellants and others co-complainants was prepared and ready to be filed and asked leave to file same. The record discloses that this amended and supplemental bill was filed by leave of court. This necessarily included leave to appellants and the others desiring to become co-complainants to join with Bragg in the bill.

Appellees cite and discuss authorities which state the rule as to the circumstances under which courts will permit a change of parties to an action or the substitution of a new party for one in whose name the suit was brought. These cases, and the principles they involve, are not applicable to the question presented for our consideration in this case. Here, Bragg and Carr filed their bill as representatives of a class and on behalf of themselves and all others included within that class. Appellants were equally interested with Bragg and Carr in the outcome of the litigation and would be affected by the result of the litigation in the same way. In *Knopf v. First Nat. Bank of Chicago*, 173 Ill. 331, (a suit restraining the extension and collection of taxes,) in discussing the right of a tax-payer to bring the suit, his relations to other tax-payers and the effect of the litigation, we said: "It is true that in any suit to prevent the levy or collection of an illegal tax there is no privity or legal relation of common property or common right as between the tax-payers. The only common

interest between them is in the question at issue, and in the fact that all are injured by the same wrongful and illegal act of levying the tax. This is just as true when several tax-payers join or if the whole body of tax-payers should unite in a bill. The right of each one is individual and separate, but the common relation has been deemed sufficient to authorize the exercise of the power of equity either where the suit is by a number of tax-payers on behalf of themselves and others similarly situated, or by one suing on behalf of all others, or even where the suit is by one suing for himself alone, where the effect would be to settle the rights of all." Appellants were proper parties to join as complainants in the first instance, and upon application they had the right to join as complainants at any time before the cause was finally determined. After they had joined as complainants their rights related back to the date of the filing of the original bill. They stood on an equal footing with the original complainant and all others who had later joined with him. After appellants had been permitted to join as complainants they became vested with an interest in the subject matter of the suit, and the original complainant thereafter did not have the power to dismiss the suit to their prejudice.

This proceeding is analogous to a suit instituted by a creditor for the benefit of all similarly situated. In such cases it has been held that until an inchoate plaintiff has come into the record or a judgment has been reached, the control of the action remains with the active plaintiff, who may either continue, compromise, abandon or dismiss the action, but as soon as a person similarly situated with the original plaintiff has come into the record in a proper way as party plaintiff he becomes vested with an interest in such subject matter of the action, and thereafter nothing can be done by the original plaintiff in derogation of his rights and interests. The original plaintiff still has a right to prosecute the action, but he cannot, without the consent



of his added co-plaintiff, abandon or discontinue it. *Atlas Bank v. Nahant Bank*, 23 Pick. 480; *Hirshfeld v. Fitzgerald*, 157 N. Y. 166; 30 Cyc. 139.

The dismissal as to Bragg and the other complainants did not have the effect of dismissing the suit, and the court erred in entering its order dismissing the suit *nunc pro tunc* as of November 13, 1914.

No temporary restraining order had been secured. At the time of the hearing on the motion to dismiss the suit *nunc pro tunc* as of November 13 the appellants asked for an injunction restraining the collector from demanding payment of the taxes objected to, and it is urged that the court erred in denying this motion. Nothing is presented for review by this motion. The appellants relied upon the proof taken before the master in support of the motion, and this proof is not incorporated in the record.

The decree of the circuit court dismissing the bill is reversed and the cause remanded to that court.

*Reversed and remanded.*

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OTTO MILLER *et al.* Defendants in Error, *vs.* GUSTAVE  
ANDERSON, Plaintiff in Error.

*Opinion filed October 27, 1915.*

1. PRACTICE—section 81 of the Practice act construed. By the amendment in 1911 of section 81 of the Practice act it was intended to treat all three methods of preserving the record for review,—that is, by bill of exceptions, certificate of evidence and report of trial,—in very much the same manner, and that the practice under one method should not differ materially from the practice under another.

2. SAME—section 81 of Practice act does away with necessity of formal exceptions. Section 81 of the Practice act, as amended in 1911, does away with the necessity of incorporating formal exceptions into the record in order to preserve the rulings of the trial court for review, whether the evidence is preserved by a bill of exceptions, a certificate of evidence or a stenographic report of trial.

3. SAME—*stenographic report of trial must not contain judgment.* A stenographic report of trial is intended to cover practically the same ground as a bill of exceptions and must not contain the judgment, as the judgment is a part of the record proper and must appear therein.

WRIT OF ERROR to the Branch "D" Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. HOSEA M. WELLS, Judge, presiding.

FRANK C. RATHJE, and ADOLPH H. WESEMANN, (HORACE KENT TENNEY, CHARLES F. HARDING, ROGER SHERMAN, GEORGE T. ROGERS, and HARRY A. PARKIN, of counsel,) for plaintiff in error.

CHARLES A. WILLIAMS, (MELVILLE R. ADAMS, JACOB H. MARX, and BENJAMIN EPSTEIN, of counsel,) for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was an action brought in the municipal court of the city of Chicago by defendants in error against plaintiff in error to recover commissions on a sale of real estate, being "a first-class contract case," as that term is used in the Municipal Court act. Jury was waived and trial had before the judge, and a judgment was entered in favor of defendants in error for \$1291.87 and costs. On appeal the judgment of the trial court was affirmed by the Appellate Court on the ground that there was no error in the record which was properly preserved for its consideration. The cause has been brought to this court on petition for *certiorari*.

The principal question for our consideration is whether the legislature, by an amendment to section 81 of the Practice act in 1911, (Hurd's Stat. 1913, p. 1871,) intended to

do away with the necessity of formal exceptions to rulings of the trial court and to render all such rulings subject to review without such exceptions, at the instance of the party adversely affected thereby.

The portion of said section 81 of the Practice act as amended, necessary to be construed, reads as follows: "If, during the progress of any trial in any civil or criminal cause, either party shall submit to the court any matter for a ruling thereon and the court shall rule adversely to the party submitting the same, such ruling shall be deemed a matter for review in any court to which the same cause may be thereafter taken upon appeal or by writ of error without formal exception thereto, and after judgment, at any time during the term of the court at which judgment was entered or within such time thereafter as shall, during such term, be fixed by the court, any party desiring to prosecute a writ of error to or appeal from any such judgment, may submit to the court a stenographic report of the trial containing the evidence and the rulings of the court upon all or any of the questions submitted to and ruled upon by the judge thereof, and he shall examine the same, and, if correct, officially certify to the correctness of such report, and the same shall thereupon be filed in said court and become a part of the record in said cause, and all matters and things contained in such stenographic report shall become as effectually a part of said record as if duly certified in a formal bill or bills of exception, or if, during the progress of any trial in any civil or criminal cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said exception and sign the same, and the said exception shall thereupon become a part of the record of such cause. A bill of exceptions, certificate of evidence, or report of trial allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried or by the presiding

judge thereof, if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto."

All of the first part of this section quoted, down to the portion beginning, "if, during the progress of any trial in any civil or criminal cause, either party shall allege an exception," etc., was added by said amendment of 1911. Section 81 was also amended in other particulars, especially by adding a new paragraph at the end, by which it was made possible to have a case reviewed on certain points without taking up a complete record upon following a certain procedure, the opposite party being entitled to notice and being privileged to have additional parts of the record included, and the Supreme or Appellate Court being authorized to require such further parts of the record certified as deemed necessary. We shall have occasion to refer to this paragraph later in this opinion.

Previous to the passage of the present Practice act, in 1907, we are aware of no provision in our statutes that refers in any way to making a "certificate of evidence" for the purpose of preserving evidence in any cause. Section 81 of said Practice act, as enacted in 1907, was a substantial re-enactment of the portion of the Practice act of 1872 as to bills of exceptions, with the added provisions as to the formality of signing or authenticating the bill of exceptions by the judge, and also how such bill of exceptions should be authenticated in case the judge who tried the cause was unable to do so on account of death, sickness or other disability, here inserting for the first time the same provisions with reference to the signing and authentication of a certificate of evidence. For the first time in the Practice act by the amendment of 1911 provision was made for the preservation of the record in the trial court for review in a higher court by a "stenographic report of the trial," although similar provisions had theretofore been

made by the legislature in 1905 in section 23 of the Municipal Court act.

Counsel in this case do not agree as to whether the evidence and rulings of the court have been preserved by a "bill of exceptions" or a "stenographic report of the trial." On the one side it is contended that, regardless of whether the document is called a bill of exceptions or a report of the trial, it is in sufficient conformity with the statute to raise the questions here in dispute, while counsel on the other side insist that it is not a "stenographic report of the trial" as provided for by statute, and that as a bill of exceptions it does not preserve for review the questioned rulings of the trial court. The specific contention is that the document does not preserve an exception to the entry of the judgment by the trial court, and that therefore the plaintiff in error cannot ask to have the judgment reversed on the ground that the evidence was insufficient to sustain the judgment.

Previous to the amendment of said section 81 in 1911 it had been held by this court in a long line of decisions that in the absence of an exception to the judgment, preserved by a bill of exceptions, in a case tried by the court, the sufficiency of the evidence to support the judgment could not be inquired into on appeal. (*Climax Tag Co. v. American Tag Co.* 234 Ill. 179, and cases cited.) Counsel for defendants in error concede that under section 81 as amended, if this document is a stenographic report, no exception need be preserved in the record to enable the finding of the court to be reviewed, but they insist that the document is a bill of exceptions, and that section 81 as now amended, read in connection with the rest of the Practice act, properly construed, did not do away with the necessity of taking formal exceptions to the adverse rulings of the trial court, while counsel for plaintiff in error insist that the legislature plainly intended to do away with the necessity of taking exceptions to the rulings of the trial court,

whether the proceedings be preserved for review by stenographic report of the trial or by bill of exceptions.

The preservation of records for review in the higher court by "bills of exceptions," "certificates of evidence," "reports of trial," "statements of fact," "case made" or "abstract" is of statutory origin, (*Hains v. Danderine Co.* 248 Ill. 259; 3 Cyc. 75; 3 Ency. of Pl. & Pr. 378;) although in this State a certificate of evidence to preserve the evidence in chancery cases seems to have been incorporated into our practice without any special statute. (*Smith v. Newland*, 40 Ill. 100; *Flaherty v. McCormick*, 123 id. 525.) As already stated, in Illinois the methods of preserving the proceedings of the trial court for review in the higher court are by bill of exceptions, certificate of evidence and stenographic report of the trial, and there is also provided by section 23 of the Municipal Court act a method of preserving the proceedings for review by a "statement of facts." This court has held that the term "bill of exceptions" was not appropriately used with reference to proceedings in equity, "for it is never proper to take exceptions to the rulings of the court in a chancery case, as it would be, under like circumstances, in a case at law." (*Flaherty v. McCormick*, *supra*, p. 533.) The term "bill of exceptions," however, has frequently been applied by this court in referring to a document used in equity proceedings to preserve evidence for review, and this, too, when no exceptions were required to be noted in such trials. (*White v. Morrison*, 11 Ill. 361; *Ferris v. McClure*, 40 id. 99; *McIntosh v. Saunders*, 68 id. 128.) The practice as to settling and signing certificates of evidence in chancery cases has always been the same in this State as in settling and signing bills of exceptions. (*People v. Williams*, 91 Ill. 87; *Conductors' Benefit Ass'n v. Leonard*, 166 id. 154, and cases cited.) Until the addition of the last paragraph of section 81 of the amendment of 1911, both bills of exceptions and certificates of evidence, if it

was sought to show that the judgment or decree was not supported by the evidence, must show in some way that they contained all the evidence. *Nason v. Letz*, 73 Ill. 371; *Seaverns v. Lischinski*, 181 id. 358; *Hutchinson v. Bambas*, 249 id. 624; *First Nat. Bank of Chicago v. Baker*, 161 id. 281.

Counsel for defendants in error earnestly argue that this is not a "stenographic report" because it does not clearly show that it contains all the evidence heard in the trial below. This conclusion does not necessarily follow, because the last paragraph of said section 81 of the Practice act provides that a *præcipe* record can be made up not only by a bill of exceptions but by certificate of evidence or by a report of the trial; that if the matters contained in said bill of exceptions, certificate of evidence or report of trial are all that is relevant or necessary for a consideration of the errors and cross-errors assigned in the court of appeal, "the record shall not be deemed defective or insufficient on account of a failure to have the same embraced as a part of such bill of exceptions, certificate of evidence or report of trial," but such omissions shall be indicated by notations within brackets.

Obviously, from a reading of said section 81 of the Practice act as amended in 1911, it was intended to treat all three methods of preserving the record,—that is, by bill of exceptions, certificate of evidence and report of trial,—very much in the same manner, and that the practice under one method should not differ materially from the practice in another. It will be noted that the method of authenticating and signing by the judge and the method of preserving the record in the absence of the judge who heard the trial are the same in all three. Then, too, especially important is the fact that so-called *præcipe* records, under the last paragraph of said section, can be preserved under any of the three methods. While the formal opening and closing of the three documents may be somewhat differ-

ent under the statute, substantially the same facts would necessarily be required to be stated in all three of these documents. The wording of the beginning and ending of the ordinary bill of exceptions in the general common law practice and the ordinary certificate of evidence in the general chancery practice is very similar, practically the only difference being in the name of the document. Of course, if the bill of exceptions were to be made only in the form as that document was originally understood, the distinction between a formal bill of exceptions and the stenographic report of the trial provided for in the statute would be clear. Under the earlier practice, each exception taken during the trial was written out and authenticated as a separate instrument, called a special bill of exceptions. In some jurisdictions this practice is still followed, but under the modern practice in most jurisdictions all exceptions taken on the trial of a case are generally included in one general bill. (3 Ency. of Pl. & Pr. 385, and cases cited; 3 Cyc. 25, and cases cited.) This last mode, as is well known to all lawyers and judges, has been the practice in this State. The term "bill of exceptions" has frequently been understood in practice, in this and other jurisdictions, to mean the general document by which the record of the proceedings of the trial court was preserved for review, without regard to formal exceptions being taken as to each adverse ruling of the trial court, the connection in which the term is used showing plainly the meaning intended. Thus, in section 38 of the Municipal Court act it is provided that "whenever it appears in any bill of exceptions signed in any case \* \* \* determined in the municipal court, that any erroneous ruling was made by said municipal court against the objection of the party complaining thereof, but that no formal exception was taken by such party thereto, such erroneous ruling shall be subject to review upon appeal or writ of error to the same extent and in like man-



ner as if it appeared that a formal exception had been taken," etc.

It is obvious from a reading of section 81 that the legislature intended to treat "bills of exceptions," "certificates of evidence" and "reports of trial" as meaning substantially the same thing. The last section of the sentence as amended reads: "Such bill of exceptions may be prepared by any competent reporter." Beyond question, the term "bill of exceptions" is used in that sentence as meaning either a bill, certificate or report. Moreover, the practice in this State has been quite general, as already stated, of applying the name "bill of exceptions" to the document used in a chancery cause to preserve the evidence even though exceptions were not required in such cause to preserve for review the rulings of the trial court.

Did the legislature, when it amended section 81 of the Practice act in 1911, intend that the provision inserted in the first part of that section, if "either party shall submit to the court any matter for a ruling thereon and the court shall rule adversely to the party submitting the same, such ruling shall be deemed a matter for review in any court to which the same cause may be thereafter taken \* \* \* without formal exception thereto," should apply not only to a record kept by a "stenographic report" but also when the proceedings were preserved by a bill of exceptions? The intention of the law-makers is the law. Such intention is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. To accomplish this the courts will consult the whole act and compare each of the various sections and provisions, and will not confine themselves, in ascertaining the real meaning, to the actual words employed but will look to former laws and statutory provisions. In seeking such intention, not only the language used by the legislature will be considered, but the evil to be remedied and the object to be obtained. (*Wa-*

*bash, St. Louis and Pacific Railway Co. v. Binkert*, 106 Ill. 298; *Hoyne v. Danisch*, 264 id. 467.) Beyond question the legislature intended by the amendment to said section 81 of the Practice act of 1911 to adopt a policy as to dispensing with the necessity of exceptions to preserve questions for review in courts generally, similar to that which had been placed upon the statute books by the Municipal Court act with reference to the practice in that court. By sections 23 and 38 of the Municipal Court act the legislature provided for preserving the record for review both by stenographic report and by bills of exceptions, without the necessity of taking formal exceptions to the rulings of the court. The amendment of said section 81 of the general Practice act doing away with the necessity of formal exceptions to the rulings of the trial court was undoubtedly made for the purpose of simplifying the practice and procedure in these matters. If, when the proceedings of the trial court are preserved by bill of exceptions, it is necessary to have a formal exception preserved by the record in order to have the rulings of the trial court reviewed, then, instead of simplifying the practice, this amendment, by providing two methods where but one had existed, would complicate it. An attorney would have to decide at the beginning of the trial whether he would preserve his record for review by bill of exceptions or by a stenographic report and act accordingly as to the saving of exceptions. Conceding section 81 to be somewhat awkwardly worded on this subject, yet when that section is read in connection with the rest of the Practice act, bearing in mind the object sought to be obtained by this amendment and the history of the legislation on this subject, we can reach no other conclusion than that the legislature intended to do away with the necessity of incorporating in the record (whether it be in the form of a stenographic report of the trial or a bill of exceptions) the

formal exceptions, in order to preserve for review the rulings of the trial court.

Counsel for defendants in error insist that as the formal judgment is not found in this document it cannot be held to be a stenographic report. We think it is clear from a fair construction of this statute that a stenographic report was intended to cover practically the same ground as a bill of exceptions. It has never been the province of a bill of exceptions to incorporate therein the final judgment. That is a part of the record proper and must appear therein. (*Cilley v. Hawkins*, 48 Ill. 308; *Hamlin v. Reynolds*, 22 id. 207; 2 Cyc. 1072; 3 Ency. of Pl. & Pr. 407.) In view of the conclusions already reached on the questions heretofore considered, it is of little practical importance to decide into which classification the document here in question falls, as the question of the sufficiency of the evidence can be raised in either event. We are disposed to think, however, that in view of the formal parts of the document it may be more properly styled a bill of exceptions than a stenographic report of the trial.

The Appellate Court's view that it could not consider the question whether the evidence was sufficient to support the judgment not being in accord with the conclusions reached herein, the judgment is reversed and the cause remanded to that court for consideration of the various errors assigned on this record and for further proceedings not in conflict with the views herein expressed. The clerk of this court is ordered to transmit the record to the Appellate Court for the First District in accordance with these directions.

*Reversed and remanded, with directions.*

THE PEOPLE *ex rel.* Oliver L. Chadwick, Appellee, *vs.*  
CHAS. H. SERGEL, City Treasurer of Chicago, Appellant.

*Opinion filed November 6, 1915.*

1. MUNICIPAL CORPORATIONS—*an appropriation ordinance must cover miscellaneous receipts.* Under paragraphs 89, 90, 91 and 111 of the Cities and Villages act the appropriation ordinance to be passed during the first quarter of the fiscal year is not intended to be limited to funds received from taxation, but to include also receipts of the city from miscellaneous sources.

2. SAME—*city cannot, after first fiscal quarter, appropriate miscellaneous receipts for expenses.* A city has no power to take miscellaneous receipts not derived from taxation and appropriate them, after the expiration of the first quarter of the fiscal year, to the payment of current liabilities.

APPEAL from the Superior Court of Cook county; the  
Hon. THEODORE BRENTANO, Judge, presiding.

WILLIS E. THORNE, for appellant.

CHURCH, SHEPARD & DAY, for appellee.

RICHARD S. FOLSOM, Corporation Counsel, (CHARLES M. HAFT, and JAMES G. SKINNER, of counsel,) for the city of Chicago.

Mr. CHIEF JUSTICE FARMER delivered the opinion of the court:

The People, on the relation of Oliver L. Chadwick, filed a petition in the superior court of Cook county praying a writ of *mandamus* against Charles H. Sergel, treasurer of the city of Chicago, commanding him to pay out of a certain fund a warrant drawn by the city of Chicago payable to the relator. Upon a hearing the superior court awarded the peremptory writ, and the validity of a municipal ordinance being involved, the city treasurer prosecuted an appeal direct to this court.

The warrant which appellant refused to pay was for \$125, and was issued by virtue of an ordinance the validity

of which is denied by the appellant. Said ordinance was passed July 15, 1915, and is as follows: "That there be and is hereby appropriated from miscellaneous receipts for the year 1915 not otherwise appropriated or pledged, the sum of twenty-five thousand (\$25,000) dollars, to be set up by the city comptroller and city treasurer to the credit of account 50s, services, benefits, claims and refunds, expert witness' and commissioners' fees, to be expended under the direction of the board of local improvements." The warrant the payment of which is sought to be compelled was drawn against the fund or account 50s for personal services. The position of appellant is that the appropriation made for that fund or account in the annual appropriation ordinance had been exhausted, and that the ordinance of July 15 appropriating \$25,000 to that account having been passed after the first quarter of the fiscal year, was void and conferred no authority upon him to pay warrants drawn by virtue of said ordinance.

Pursuant to paragraph 89 of the Cities and Villages act, requiring the annual appropriation bill to be passed during the first quarter of the fiscal year, the city council, on January 18, 1915, passed the annual appropriation ordinance, appropriating for corporate purposes of the city of Chicago \$28,361,617.02. By said appropriation ordinance the sum of \$25,000 was appropriated to pay "personal services other than by employees; expert witness' and commissioners' fees." All of this sum except \$1.35 had been paid out on warrants drawn against the appropriation prior to the passage of the ordinance of July 15. The question presented for determination is whether a municipality can take miscellaneous revenues not derived from taxation and appropriate them, after the expiration of the first quarter of the fiscal year, to the payment of current liabilities.

Paragraph 89 of the Cities and Villages act requires city councils and boards of trustees in villages, within the first quarter of each fiscal year, to pass an ordinance termed the

annual appropriation bill, appropriating such sums as may be deemed necessary to defray all necessary expenses and liabilities of the corporation. The ordinance is required to specify the objects and purposes for which the appropriations are made and the amount appropriated for each object or purpose. "No further appropriations shall be made at any other time within such fiscal year" unless under conditions not here involved. Paragraph 90 prohibits the council or board of trustees, or any officer or department of the corporation, from adding to the corporate expenditures, in any one year, anything above the amount provided for in the annual appropriation bill of that year, except as is therein specially provided. Paragraph 91 provides that no expense shall be incurred by any officer or department of the corporation unless an appropriation shall have been previously made concerning such expense. By paragraph 111 the city council is required, annually, on or before the third Tuesday in September of each year, to ascertain the total amount of the appropriations legally made for corporate purposes and to be collected from the tax levy of that fiscal year, "and, by an ordinance specifying in detail the purposes for which such appropriations are made and the sum or amount appropriated for each purpose respectively, levy the amount so ascertained upon all the property subject to taxation within the city or village as the same is assessed and equalized for State and county purposes for the current year."

Appellee's contention is, that, construing these paragraphs together, they were intended to require that the appropriation ordinance passed during the first quarter of the fiscal year should appropriate only the revenues and funds of the corporation received from taxation; that as to receipts from miscellaneous sources they may be appropriated for the payment of current expenses at any time during the fiscal year. If this position is correct then the annual appropriation ordinance passed during the first quarter of the

fiscal year and the tax levy would be for the same amount, or, at least, there would be no necessity for the appropriation exceeding the amount of the tax levy. The provisions of the statute referred to are mandatory and have been held to have been enacted for the protection of the tax-payer. *City of Chicago v. Nichols*, 177 Ill. 97; *People v. Florville*, 207 id. 79; *People v. Read*, 261 id. 502; *People v. McElroy*, 248 id. 574.

Appellee argues that the protection intended to be afforded the tax-payer by paragraph 89 was against the improper appropriation of the corporate funds received from taxation, alone, and has no application to the appropriation of miscellaneous receipts. The language used in the statute will not bear any such construction. The council is required, during the first quarter of the fiscal year, to pass an appropriation ordinance appropriating such sum or sums as may be deemed necessary to defray all expenses and liabilities of the corporation, and no further appropriation shall be made at any other time within the fiscal year. We have above quoted, in substance, the material parts of paragraphs 90 and 91, both of which refer to corporate expenditures for all purposes and are not limited to the expenditure of appropriations of corporate funds received from taxation. It was known to the legislature that substantially all the cities of the State receive revenues from other sources than taxation, subject to be applied to the expenses of the municipal government. Paragraph 111 does not require that the amount appropriated in the annual appropriation ordinance shall be raised by taxation. The council is required to ascertain the amount of the appropriation for corporate purposes legally made which must be raised by taxation and levy a tax therefor. In ascertaining the amount required to be raised by taxation, the amount of miscellaneous receipts which, judging from past experience, will probably be received is to be taken into consideration, and the amount necessary to pay the corporate

expenses above the amount received from miscellaneous sources is to be collected by taxation. This was clearly the understanding and was the practice of the city of Chicago, for the amount provided for by the tax levy ordinance was \$16,282,249.45, or a little more than fifty per cent of the amount appropriated in the annual appropriation ordinance for corporate purposes. It is agreed that the receipts from miscellaneous sources in the city of Chicago approximate \$12,000,000, annually. This is a public fund for the payment of the legitimate expenses of the municipal government, and the tax-payer is as much interested in the appropriation and expenditure of that fund as in the fund collected by taxation. (*Jones v. O'Connell*, 266 Ill. 443; *City of Chicago v. Nichols*, *supra*.) If the legislature had intended the provision with reference to appropriations for corporate expenditures for the protection of the tax-payer against the improper use of tax money, alone, it would undoubtedly have said so, or at least it would not have said in language plain and unambiguous that the council should appropriate, during the first quarter of the fiscal year, such sum or sums as were deemed necessary to defray "all necessary expenses and liabilities of such corporation," and that "no further appropriations shall be made at any other time within such fiscal year." Nowhere in the statute do we find any language warranting the inference that the appropriations required to be made the first quarter of the fiscal year were limited to funds collected by taxation, and as was said in *City of Chicago v. Nichols*, *supra*, we have neither power nor inclination to limit the reasonable construction and application of the statute. "If exceptions to such prohibition other than those found in the statute ought to be made, the legislative power should be invoked. Courts have power to construe and enforce statutes but not to enact or amend them."

It was stipulated on the hearing that for the past fifteen years, but not prior thereto, it had been the practice



of the council of the city of Chicago to pass ordinances after the first quarter of the fiscal year purporting to make appropriations of miscellaneous receipts not otherwise appropriated, and that the mayor, city council, city comptroller, corporation counsel and prior city treasurers had uniformly and contemporaneously construed the law to permit such appropriations, and it is contended the ordinance should be sustained on the ground of contemporaneous construction. Neither the statute nor the facts admit of the application of that doctrine. The statute, by language plain and unambiguous, limits the expenditure of corporate funds to the amounts appropriated during the first quarter of the fiscal year for the respective corporate purposes mentioned in the appropriation ordinance and prohibits any other appropriation being made at any other time within such fiscal year. That it has been construed contrary to its plain language and meaning would not justify sustaining the ordinance in question on that ground.

The judgment of the superior court is reversed.

*Judgment reversed.*

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THE CITY OF CHICAGO, Defendant in Error, vs. FRED H. ATWOOD, Plaintiff in Error.

*Opinion filed October 27, 1915.*

1. NUISANCES—*when an ordinance need not define condition which shall be a nuisance.* It is not necessary that an ordinance requiring hopper-closets, when found to be a nuisance, to be removed shall define the physical condition which shall constitute a nuisance; nor need the ordinance specify who shall find the nuisance, as the words "found to be a nuisance" mean found, discovered or perceived to be a nuisance by anyone affected thereby.

2. SAME—*who shall remove a nuisance.* Where an ordinance requires that a hopper-closet, when found to be a nuisance, shall be removed, the person who shall remove it is necessarily the person who allows it in the building and has authority to remove it.

3. *SAME—when the landlord is responsible for nuisance created and allowed to be maintained in building.* If premises are let with a nuisance on them, the landlord, and not the tenant, is liable for an injury caused by such nuisance.

4. *SAME—when removal of a nuisance not considered as a repair of premises.* Where a nuisance is a fixture and part of the building itself, its removal and the substitution of a fixture of a different kind cannot be considered ordinary repairs to the premises which a tenant would be required to make.

5. *SAME—when landlord should provide right of entry in the lease so as to remove nuisance.* Where it is the duty of the landlord, alone, to remove the nuisance in his building, he should have a right of entry for such purpose inserted in the lease.

6. *SAME—when landlord not entitled to notice to remove nuisance.* Where the landlord is bound, under the provisions of an ordinance, to remove a certain type of water-closet if it should become a nuisance, he is not entitled to notice to do so.

7. *SAME—when instruction defining a nuisance should not be given.* An instruction which tells the jury that "a nuisance is anything that works hurt, inconvenience or damage," is an abstract proposition of law and ought not to be given.

8. *SAME—when modification of an instruction is error.* An instruction stating that "if the water-closets are kept in a reasonably clean and sanitary condition that is all that is necessary under the law and the ordinances," should not be modified by inserting the words "and are not nuisances," after the word "condition."

9. *SAME—water-closets not detrimental to health may nevertheless constitute nuisance.* Noisome odors, alone, may make water-closets a nuisance, and an instruction requiring their condition to be detrimental to health in order to be a nuisance is erroneous.

10. *EVIDENCE—when error of court as to admission of evidence is harmless.* Error in admitting in evidence copies of notices to the defendant, which copies were not admissible because of the insufficiency of preliminary proof, is harmless, where the defendant was not entitled to notice in order to be held liable.

WRIT OF ERROR to the Municipal Court of Chicago;  
the Hon. ROBERT H. SCOTT, Judge, presiding.

FRANK B. PEASE, CHARLES O. LOUCKS, and VERNON R. LOUCKS, (GEARY V. STIBGEN, of counsel,) for plaintiff in error.

RICHARD S. FOLSOM, Corporation Counsel, and HARRY B. MILLER, Prosecuting Attorney, (MARSHALL SOLBERG, of counsel,) for defendant in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

This was an action by the city of Chicago to recover a penalty for an alleged violation of section 1880 of the Chicago code of 1911, which is as follows:

*"Prohibited closets—Removal.*—Pan, plunger, offset, washout-range closets and wash-out latrines shall not be allowed in any building, nor shall hopper-closets be installed in any building hereafter erected. Such closets, when found to be a nuisance, shall be removed, or when the same are removed for repairs they shall not be again installed," etc.

A fine of not less than \$25 nor more than \$200 is provided for a violation of the ordinance. The case was tried by a jury, which found the defendant guilty and assessed a fine of \$50 against him. Judgment was rendered on the verdict, and a judge of the municipal court having certified that the validity of a municipal ordinance was involved and that in his opinion the public interest so requires, the defendant has sued out of this court a writ of error.

The ordinance has been in force since March 23, 1905. The plaintiff in error then owned, and has ever since owned, a three-story building at 3100-3102 North Racine avenue, having on the first floor two stores with living rooms in the rear, and two flats above each store. In the living rooms back of each store was a water-closet for the exclusive use of the occupants of the store and connecting living rooms. The closet rooms were of sufficient size, and each had a window of sufficient size opening into an air-shaft running to the roof and covered with a sky-light, with a ventilator at each end. All the water-closets in the building opened on the air-shaft. There was a serious conflict in the evidence, but there was evidence tending to

show that the conditions were such as to constitute a nuisance. The first-floor closets were hopper-closets. They had been installed before the passage of the ordinance and the premises had been leased to the tenants by the plaintiff in error after the passage of the ordinance. The offense charged was permitting water-closets to remain on the premises which had become a nuisance.

It is contended that the ordinance is indefinite, and therefore invalid, because it does not ordain who shall remove the closets or who shall find the closets to be a nuisance, and does not define the physical conditions which shall constitute the closets a nuisance. The language, "such closets, when found to be a nuisance, shall be removed," etc., does not require a judicial or official finding. The words, "found to be a nuisance," mean found, discovered or perceived to be a nuisance by anyone affected by the nuisance. It is not necessary that the ordinance should define the physical condition which shall constitute a nuisance. "Whatever is offensive, physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance." (*Wahle v. Reinbach*, 76 Ill. 322; *Oehler v. Levy*, 234 id. 595.) The existence of such offensive condition was essential to the recovery and the burden of proving it rested upon the city. The person who shall remove the closet when found to be a nuisance is necessarily the person who allows it in the building and has authority to remove it. It is by his sufferance that the nuisance is created and maintained and it is he who is subject to the penalty of the ordinance.

It is argued that the plaintiff in error is not responsible for the nuisance and not required to remove the closet, and reliance is placed upon the doctrine that in the absence of an express agreement a landlord is not bound to make repairs in premises in the exclusive occupation of a tenant and is not liable for a nuisance committed by a tenant in such premises. There was no evidence of the terms

of the letting of the premises, and the rule as to the liability of landlord and tenant for repairs, as between themselves, has no application. While the occupant, and not the owner, is ordinarily responsible for injuries arising from a failure to keep premises in repair, yet if premises are let with a nuisance on them the landlord is liable for an injury caused by such nuisance. (*Tomle v. Hampton*, 129 Ill. 379; *Baird v. Shipman*, 132 id. 16.) In *Miller v. Fisher*, 111 Md. 93, it is said, that "where the owner leases premises which are a nuisance, or must in the nature of things become so in their use, and receives rent, then, whether in or out of possession, he is liable." The plaintiff in error rented his building with a water-closet which the ordinance required should be removed if it should become a nuisance. Its use was indispensable in connection with the use of the property, and it did, as found by the verdict of the jury, become a nuisance. It was a fixture and part of the building itself, and its removal and the substitution of one of a different kind could not be considered ordinary repairs to the premises. It was a part of the structure of the building itself, which the owner, alone, could change. When it became a nuisance the ordinance required its removal, and the plaintiff in error, alone, could cause it to be removed. It may be that the tenant was liable for the nuisance, but his liability could not relieve the landlord. The latter, alone, was authorized to make the change required by the ordinance in the structure. It was his duty to make the change, and, if necessary, he should have had the right of entry for such purpose inserted in the lease if he did not otherwise have it. It was only by its use that the water-closet could become a nuisance, and the plaintiff in error demised the premises intending it to be used. By the use contemplated the nuisance arose, but the penalty imposed on the plaintiff in error was not for the creation of the nuisance but

for his failure to remove the hopper-closet after it became a nuisance.

Complaint is made of the first instruction given, which told the jury to find for the plaintiff if they believed, from the evidence, that defendant had in his building a water-closet which prior to the beginning of the suit had become a nuisance and that he failed to remove it after it became a nuisance. The objections made are, that this instruction is a mis-statement of the law applicable to a landlord not in possession, and that it omits the element of defendant's knowledge that a nuisance existed. The first objection is answered by what has already been said. The second is immaterial, because the plaintiff in error was bound to remove the water-closet if it became a nuisance, and was not entitled to notice to do so.

Instruction No. 4 was as follows:

"The court instructs the jury that a nuisance is anything that works hurt, inconvenience or damage."

This is an abstract proposition of law which ought not to have been given. It was of no benefit to the jury and gave them no rule by which they could apply the law to the facts in this case.

By his offered instruction No. 10 the plaintiff in error requested the court to instruct the jury that "if the water-closets are kept in a reasonably clean and sanitary condition, this is all that is necessary under the law and the ordinances." The court modified the instruction by inserting after the word "condition" the words "and are not nuisances." If the closets were reasonably clean and sanitary they could not be nuisances; if they were nuisances they could not be reasonably clean and sanitary. By the modification the jury were told, in effect, that something more was necessary than that the closets should be reasonably clean and sanitary; that though reasonably clean and sanitary they might still be nuisances; but by no instruction were they told under what circumstances this might

be, and the definition given of a nuisance could not give them any light. The modification of the instruction was error.

The plaintiff in error's instruction No. 11 stated that a sanitary inspector of Chicago was not authorized to declare what is and what is not a nuisance, or what has become or what has not become a nuisance, or to find what is or what is not a nuisance. The court properly modified the instruction by adding the words, "that question is for you to determine from a consideration of all the evidence."

The plaintiff in error contends that his refused instructions 2, 4, 5, 6, 7 and 11 should have been given. They were all based on the theory that because the premises were in the possession of tenants the landlord was not liable, and were therefore properly refused.

It is also urged that the court erred in refusing to give instructions Nos. 1 and 10 asked by the plaintiff in error. Instruction No. 1 stated that if the jury believed, from the evidence, that the water-closets, at the time the building was constructed, were in conformity with the law and ordinances of the city of Chicago then in force, then, unless they have become unfit for the purpose for which they were originally constructed, the plaintiff in error was not required to take them out and put in others. This instruction was properly refused, because it would have told the jury that plaintiff in error was not required to remove the closets if they became nuisances. Instruction No. 10 was as follows:

"I instruct you that if you believe that the water-closets in question are in such a condition as not to be offensive and detrimental to the health of the persons occupying the flat in which said closets are located or persons occupying the building in question, then you will find the defendant not guilty."

This instruction was erroneous in requiring the condition to be detrimental to health, when noisome odors,

alone, may have made the water-closets a nuisance. *Wahle v. Reinbach, supra.*

It is insisted that the court erred in admitting in evidence copies of two notices alleged to have been sent to the defendant. We have held that notice to the plaintiff in error was immaterial. The plaintiff in error did not object on that ground but because the preliminary proof was not sufficient to admit copies in evidence. The preliminary proof was insufficient but no harm was done to the plaintiff in error. The attempt to prove notice was simply an additional burden upon the defendant in error which it unnecessarily assumed.

For the errors in the instructions the judgment is reversed and the cause remanded.

*Reversed and remanded.*





# INDEX.

ABANDONMENT.	PAGE.
when abandonment of old highway may be presumed— when doctrine of equitable estoppel will be applied and public be held bound by abandonment of road.....	555
when leasing of homestead premises is not an abandon- ment of homestead estate—when a homestead is not abandoned though dwelling is burned.....	584
ABSTRACT OF RECORD.	
everything necessary to a consideration of the questions raised by appeal must appear in abstract of record....	451
ACTIONS AND DEFENSES.	
what does not raise an estoppel against right of a State's attorney to collect legal fees.....	28
arson and burning goods to injure insurance company are distinct offenses, and an acquittal of the charge of arson does not bar prosecution on other charge.....	301
when the Statute of Frauds is a good defense to bill to specifically enforce contract made by agent.....	381
what is necessary to establish title under section 1 of the Statute of Limitations—strong evidence is necessary to show adverse possession by co-tenant.....	437
equity ordinarily follows law in barring claims for <i>laches</i> .	437
what facts may be considered and what may be shown as bearing upon the question of <i>laches</i> .....	438
when proposed vendors are not required to convey if pro- posed vendee objects to the title.....	459
when Statute of Limitations does not run against princi- pal and in favor of a general investing agent or as to transactions between husband and wife.....	472
when defendant in ejectment cannot insist that plaintiff should have proved title from government.....	532
what evidence not admissible to sustain the sheriff's deed based on sale under execution.....	532

ACTIONS AND DEFENSES.— <i>Continued.</i>		PAGE.
what plea, if proved by the evidence, will establish right of foreign corporation to bring suit in Illinois.....	535	
rules applicable to specific performance apply to bill to enjoin breach of negative covenant.....	539	
breach of negative covenant will not be enjoined if there is a want of mutuality.....	539	
ADMISSIONS.—See EVIDENCE.		
ADOPTION.		
what fact does not affect jurisdiction of county court in an adoption proceeding.....	343	
ADVERSE POSSESSION.—See LIMITATIONS.		
AGENCY.—See PRINCIPAL AND AGENT.		
ALLEYS.—See HIGHWAYS.		
ANTE-NUPTIAL CONTRACTS.		
an engagement to marry is necessary in order to create a confidential relation—when ante-nuptial contract does not show an engagement to marry.....	342	
what is not a cancellation of contract—wife's assent to cancellation of ante-nuptial contract is necessary.....	342	
when ante-nuptial contract does not bar widow's award..	342	
APPEALS AND ERRORS.		
section 61 of the Practice act, concerning propositions of law, construed—when section 61 of the Practice act does not apply.....	72	
when whole record is open for review without restriction to action on propositions of law.....	72	
denial by Supreme Court of writ of <i>certiorari</i> is not an approval of Appellate Court's reasons for its judgment.	98	
effect where two defendants file separate petitions for a writ of <i>certiorari</i> and only one is allowed—cross-error.	98	
when the Supreme Court will not consider the weight of the evidence.....	123	
when a party is not entitled to complain of assumption in instruction .....	124	
when Supreme Court will not disturb findings of chancellor that deed was valid and well delivered.....	152	
rule as to reversal by Supreme Court in criminal case for insufficient evidence.....	293	

APPEALS AND ERRORS.—*Continued.*

PAGE.

rules of law decided on a former appeal in an ejectment case will not be reconsidered.....	377
when costs cannot be complained of on appeal.....	381
improper conduct of court officers is not ground for reversal if it is not prejudicial.....	417
the Supreme Court will not consider printed arguments of counsel couched in disrespectful language.....	421
questions raised for the first time in reply brief will not be considered, neither will errors assigned but not argued.	429
everything necessary to a consideration of the questions raised by appeal must appear in abstract of record.....	451
when certificate of evidence is sufficient to present error as to instructions.....	453
when question of competency of witness is immaterial on appeal in an inheritance tax case.....	472
when it is error to give instructions in a criminal case even though they state correct rules of law.....	505
objections to taxes are properly preserved for review on appeal if they are copied in the record.....	513
when right of objector to object to tax cannot be questioned on appeal.....	513
when it will be presumed that issue was joined although there is no <i>similiter</i> in the record.....	535
alleged error in ruling on pleadings is preserved for review without a bill of exceptions.....	535
in absence of bill of exceptions it will be presumed that evidence was sufficient to support judgment.....	535
section 81 of Practice act construed as doing away with the necessity of formal exceptions, no matter by what method the evidence is preserved for review.....	608
stenographic report of trial should not contain judgment.	609
when modification of instruction as to water-closets being nuisances is not error.....	625

## ARSON.

arson and burning goods to injure insurer are distinct offenses, and an acquittal of charge of arson does not bar prosecution for the other offense.....	301
--	-----

## ASSIGNMENTS.

if the interest of a child in the proceeds of the sale of land is contingent until distribution, no assignment is valid if the child dies before that time.....	197
effect of assignment of expectancy by an heir presumptive—when no interest vests in assignee.....	565

ATTEMPT TO STEAL.—See LARCENY.

### ATTORNEYS' LIENS.

PAGE.

effect of the Attorney's Lien law—what determines the amount of the lien where the person liable settles with claimant in full after notice..... 94

### BALLOTS.—See ELECTIONS.

production of ballots for inspection of grand jury is not a violation of the secrecy of the ballot..... 205  
 court may require production of ballots where a violation of the City Elections act is charged..... 205  
 power of court to impound ballots..... 205

### BANKRUPTCY.

statement of "net results" rule as to preferences..... 110  
 charging of an overdraft to general checking account is not a preference to bank—when satisfaction of note to bank is a preferential payment..... 110

### BANKS.

part of section 10 of Banking act of 1907 fixing limit of bank's indebtedness to one person is invalid..... 518  
 construction of referendum election provision of Banking act of 1907—both alternatives must appear upon ballot.. 519  
 stockholders of record in a bank are proper parties to a bill for a receiver..... 519

### BILLS OF EXCEPTIONS.

alleged error in ruling on pleadings is preserved for review without a bill of exceptions..... 535  
 in absence of bill of exceptions it will be presumed that evidence was sufficient to support judgment..... 535  
 section 81 of Practice act construed as doing away with the necessity for formal exceptions, no matter by what method the evidence is preserved for review..... 608  
 stenographic report of trial should not contain judgment.. 609

### BRIEFS.

the Supreme Court will not consider printed arguments of counsel couched in disrespectful language..... 421  
 questions raised for first time in reply brief will not be considered, neither will errors assigned but not argued.. 429

BROKERS.—See PRINCIPAL AND AGENT.

## BUILDING RESTRICTIONS.

PAGE.

- a building restriction in a deed will be construed in light of circumstances existing at execution—what is meant by “front” of a corner lot..... 164
- what is not ground for relieving party from building restriction—one violating injunction against completing a building acts at his peril..... 165

## BURDEN OF PROOF.—See EVIDENCE.

## BURNING INSURED GOODS.

- allegation of ownership of burned goods is not material.. 300
- arson and burning goods to injure insurer are distinct offenses, and an acquittal of charge of arson does not bar prosecution for the other offense..... 301
- what evidence in prosecution for burning goods to injure insurer is admissible to show guilty knowledge..... 302

## CAPIAS AD SATISFACIENDUM.—See EXECUTIONS.

## CASES CONTROLLED BY OTHERS.—See FORMER CASES.

- People v. Lihme*, (ante, p. 351,) controls the decision in *People v. Lihme*..... 602

## CERTIFICATES OF EVIDENCE.

- when certificate of evidence is sufficient to present error as to instructions..... 453

## CERTIORARI.

- denial by Supreme Court of writ of *certiorari* is not an approval of Appellate Court's reasons for its judgment... 98
- effect where two defendants file separate petitions for a writ of *certiorari* and only one is allowed—cross-error. 98

## CHANGE OF VENUE.

- meaning of section 6 of Venue act as to when party must apply for a change of venue..... 417
- when application for change of venue must show why it was not presented sooner..... 417

## CHARITIES.

- when gift to charity is upon condition subsequent..... 134
- what provision of will is intended to secure the application of funds to specific purposes of bequests..... 135
- general rule as to disposition of lapsed legacies—when a lapsed legacy will not pass under residuary clause..... 135

CHARITIES.—*Continued.*

PAGE.

- when the allegation that a reasonable time has elapsed to carry out charitable bequest is unnecessary..... 135
- when gifts to charity are for specific purposes and not for general investment..... 135

## CITIES.—See MUNICIPAL CORPORATIONS.

## CLOUD ON TITLE.

- grantor's intention is without effect unless deeds are delivered—what amounts to parol partition..... 491
- when parol partition may be decreed under general prayer for relief in a bill to set aside a will and deeds as clouds upon complainant's title..... 491

## CONDEMNATION.—See EMINENT DOMAIN.

## CONDITIONS.

- distinction between estates upon condition subsequent and upon conditional limitation—difference, as to forfeiture, in such estates..... 134

## CONFIDENCE GAME.

- what is a confidence game and not merely a breach of contract—what evidence of other transactions is admissible to show guilty knowledge..... 173

## CONSTITUTIONAL LAW.

- constitutional provision as to amending laws by reference to title construed—when act is within constitutional prohibition as to amending laws..... 27
- the part of section 58 of Municipal Court act concerning payment of fines is unconstitutional..... 27
- act of 1907, which required State's attorneys to pay fees into county treasury, was unconstitutional..... 28
- act of 1907, providing for payment of further compensation to State's attorney of Cook county, was invalid.. 28
- amendment of 1913 to act relating to city hospitals, which authorizes the pledging of future hospital taxes, is not, in itself, unconstitutional..... 248
- fact that the City Hospital act of 1913 amends another act by implication does not render it invalid..... 248
- repeals or amendments by implication are not necessarily prohibited by section 13 of article 4 of the constitution, concerning the titles of acts..... 248
- issuing warrants against future hospital taxes is "becoming indebted," within the constitutional limitation concerning indebtedness ..... 249

CONSTITUTIONAL LAW.—*Continued.*

PAGE.

every presumption must be indulged in favor of constitutionality of law—a law will not be held unconstitutional unless it is clearly proved so.....	478
constitution does not require that the legislative journals shall show affirmatively that bill was printed.....	478
when it will be inferred that amendments were printed...	478
the Workmen's Compensation act of 1911 was regularly passed by the legislature.....	478
amendments of bills need not be read on three different days—amendments, if germane to bill, cannot be said to destroy its identity.....	518
what is sufficient to show that a bill, together with its amendments, was printed.....	518
object of provision of constitution requiring bills to be read on three different days—when one invalid section will not invalidate whole act.....	518
part of section 10 of Banking act of 1907 fixing limit of bank's indebtedness to one person is invalid.....	518

## CONSTRUCTION.

constitutional provision as to amending laws by reference to title construed—when act is within constitutional prohibition as to amending laws.....	27
part of section 58 of Municipal Court act, concerning payment of fines, is unconstitutional.....	27
act of 1907, which required State's attorney to pay fees into county treasury, was unconstitutional.....	28
act of 1907, providing for payment of further compensation to State's attorney of Cook county, was invalid....	28
section 8 of Fees and Salaries act does not entitle State's attorney to fees not taxed as costs.....	28
when fines and penalties paid to clerk are "collected" by State's attorney, as meant by section 8 of the Fees and Salaries act .....	29
effect of act of 1911 as to fines and penalties collected for violations of park ordinances.....	29
section 8 of Fees and Salaries act has not been repealed by implication .....	29
section 53 of Local Improvement act construed.....	58
section 61 of the Practice act, concerning propositions of law, construed—when section 61 does not apply.....	72
a building restriction in a deed will be construed in light of circumstances existing at execution—what is meant by "front" of a corner lot.....	164
what may be considered in construing condition of bond..	234



CONSTRUCTION.—*Continued.*

	PAGE.
condition of indemnity bond construed.....	235
of act of 1913, relating to city hospitals, which authorizes the pledging of future hospital taxes, as not being, in itself, unconstitutional.....	248
repeals or amendments by implication are not necessarily prohibited by section 13 of article 4 of the constitution, concerning the titles of acts.....	248
of word "corporation," used in the Inheritance Tax law, as including municipal corporations.....	275
Statute of Escheats is part of intestate laws of the State..	275
what may be considered in determining intention of legislature—when the courts are not confined to the literal meaning of the words used.....	300
of section 18 of division 13 of the Criminal Code, as to when a prisoner out on bail must be tried.....	300
rule for construing a section of a statute—section II of act relating to fences construed.....	324
of section 98 of Roads and Bridges act, as not authorizing a road from two lots of land to a public road.....	371
of section 6 of the Venue act, as to when a party must apply for a change of venue.....	417
of contract, as not requiring proposed vendors to convey if proposed vendee objects to the title.....	459
of will, as to when bequests fail because of conveyance of land by testatrix in her lifetime.....	463
constitution does not require that legislative journals shall show affirmatively that bill was printed—when it will be inferred that amendments were printed.....	478
of Workmen's Compensation act of 1911, as having been passed by legislature in a regular manner.....	478
of section 1 of Workmen's Compensation act of 1911, as to what is an injury "arising out of and in the course of the employment".....	479
of provision of constitution requiring bills to be read on three different days—when one invalid section will not render whole act invalid.....	518
of part of section 10 of the Banking act of 1907, as being invalid.....	518
when a proposition need not be submitted in the form prescribed by section 16 of the Ballot law.....	519
construction of referendum election provision of Banking act of 1907—both alternatives must appear upon ballot..	519
of section 2 of the Judgments act, as to when plaintiff is entitled to <i>capias ad satisfaciendum</i> without affidavit or showing of any kind.....	558

CONSTRUCTION.—*Continued.*

PAGE.

- of section 7 of Exemptions act, as to homestead insurance,  
as not requiring householder to account to heirs for in-  
surance money on burned dwelling..... 584
- section 81 of Practice act construed as doing away with  
the necessity for formal exceptions, no matter by what  
method the evidence is preserved for review..... 608

## CONTRACTS.

- promise by a candidate to perform the duties of the office  
for less than the compensation fixed by law is illegal  
and unenforceable..... 28
- if the interest of a child in the proceeds of the sale of  
land is contingent until distribution, no assignment is  
valid if the child dies before that time..... 197
- restrictions upon the use of property are not favored—  
what necessary to authorize a court of equity to enforce  
a personal covenant..... 337
- what is not a covenant running with the land nor one  
which a court of equity may enforce..... 337
- when ante-nuptial contract does not show an engagement  
to marry—engagement to marry is necessary to create a  
confidential relation ..... 342
- what not a cancellation of contract—wife's assent to can-  
cellation of ante-nuptial contract is necessary..... 342
- when ante-nuptial contract does not bar widow's award.. 342
- agent verbally authorized to find purchasers cannot make  
a binding contract to sell land..... 381
- when decree for specific performance of contract to con-  
vey may require execution of a deed containing a re-  
lease of homestead..... 392
- when court, in decreeing specific performance, may order  
defendants to furnish title guaranty policy..... 392
- facts stated in a contract which is made a part of a bill for  
specific performance control in case of allegations in the  
bill inconsistent therewith..... 459
- when proposed vendors are not required to convey if pro-  
posed vendee objects to the title..... 459
- what plea, if established by evidence, will establish right  
of foreign corporation to maintain suit in Illinois..... 535
- rules applicable to specific performance apply to bill to en-  
join breach of negative covenant..... 539
- breach of negative covenant will not be enjoined if there  
is a want of mutuality..... 539
- what provision in a contract is not a penalty but the meas-  
ure of compensation in case of breach..... 539

## CORPORATIONS.

PAGE.

what is not sufficient proof of existence of corporation to sustain allegation of ownership.....	244
when corporation must look to its stock register to ascertain who are its stockholders—when assignee of stock becomes a stockholder.....	351
assignor is the legal owner of stock until the transfer is made on books of company.....	351
eligibility to be director follows legal ownership of stock—one to whom stock is transferred for express purpose of qualifying him as a director is eligible.....	351
by-laws will not take the place of notice required by statute—what is necessary to a waiver of notice of meeting of stockholders .....	499
what does not constitute participation in a meeting of the stockholders .....	499
mere presence of a stockholder at annual meeting is not, alone, sufficient to constitute waiver of notice.....	499
when replication to plea of <i>nul tiel</i> corporation amounts to a plea of confession and avoidance; which, if proved, establishes right of foreign corporation to sue.....	535

## COSTS.

when additional fees may be awarded in a proceeding for initial registration of title—the decree should not be in favor of registrar.....	330
when costs for taking evidence before the master cannot be complained of on appeal.....	381
complainant in specific performance not entitled to credit for payment on costs not properly taxed.....	393
court of equity cannot allow solicitor's fees to party filing bill of interpleader, as the discretion in awarding costs must be confined to fees authorized by statute.....	529

## CO-TENANCY.—See LIMITATIONS.

## COUNTIES.

county treasurer is not entitled to separate compensation as supervisor of assessments.....	234
when retaining of compensation under doubtful right will not amount to fraud.....	234
condition of indemnity bond to sureties on county treasurer's bond construed.....	235
Inheritance Tax law applies to property transferred to a county by virtue of Statute of Escheats.....	275

## COURTS.

PAGE.

court may require production of ballots where a violation of the City Elections act is charged—power of court to impound ballots .....	205
power of court to vacate leave to file information in the nature of <i>quo warranto</i> .....	212
when order granting leave to file information should not be set aside on hearing of affidavits .....	213
power of circuit court to issue writ of <i>habeas corpus ad testificandum</i> —court cannot take custody of a convicted prisoner from the warden .....	597
when effect of a writ of <i>mandamus</i> is to expunge a void order of the court .....	597
section 81 of Practice act construed as doing away with all formal exceptions, no matter by what method the evidence is preserved for review .....	608
stenographic report of trial need not contain judgment...	609

COVENANTS.—See DEEDS.

CREDITORS.—See DEBTOR AND CREDITOR.

## CRIMINAL LAW.

what is a confidence game and not merely a breach of contract—what evidence as to other transactions is admissible to show guilty knowledge .....	173
the ownership of stolen property is a necessary averment of indictment for receiving stolen property and must be proved as alleged .....	244
in whom ownership of property must be alleged—indictment for receiving stolen drug may refer to the drug by its general name .....	244
what not sufficient proof of existence of a corporation to sustain allegation of ownership of property .....	244
what evidence is incompetent to prove one guilty of receiving stolen property .....	244
instructions may be refused which are covered by others given—when ill-drawn and verbose instruction should not be refused .....	244
what is not sufficient proof to show embezzlement by an agent—mere proof of receipt of funds and failure to account is not sufficient .....	256
proof must show that agent fraudulently converted to his own use the funds received .....	256
where venue of an indictment for embezzlement should be laid—a demand for an accounting is not necessary unless made so by statute .....	256

CRIMINAL LAW.—*Continued.*

PAGE.

when conviction for embezzling proceeds of the sale of bonds cannot be sustained.....	256
general rule as to force of positive testimony of an unimpeached witness .....	256
when receipts given to agent are admissible on his trial for embezzlement .....	256
when instruction stating rule with reference to secreting funds with intent to embezzle is improper.....	257
instructions should confine the jury to evidence supporting bill of particulars.....	257
what constitutes duplicity in a criminal pleading—what may be omitted from an indictment for receiving stolen property .....	284
receiving stolen property is a single offense though there are several owners of the property.....	284
what will not be assumed in a prosecution for receiving stolen goods—what necessary to sustain conviction on testimony of confessed thief.....	284
defendant is entitled to instruction as to presumption of innocence—what will render instruction objectionable..	285
a witness cannot be impeached on an immaterial matter—what is immaterial in a prosecution for receiving stolen property .....	285
rule as to reversal by Supreme Court for insufficient evidence—what circumstance tends to corroborate prosecuting witness in robbery case.....	293
when jury cannot disregard testimony as to age of defendants—when error in sentencing defendants to reformatory cannot be corrected.....	293
section 18 of division 13 of Criminal Code construed as to when a prisoner out on bail must be tried.....	300
allegation of the ownership of goods is not material in an indictment for burning goods to injure an insurance company .....	300
rule of former jeopardy does not apply where two distinct offenses are committed by same act.....	300
arson and burning goods to defraud insurance company are distinct offenses, and an acquittal on one charge does not bar prosecution for other.....	301
jury must be accurately instructed where chief witnesses are accomplices—when an instruction as to reasonable doubt is misleading.....	301
when an error in instructions cannot be disregarded—jury should not be told to consider the surrounding circumstances appearing on the trial.....	301

CRIMINAL LAW.—*Continued.*

PAGE.

right of People to an instruction as to convicting upon circumstantial evidence—when the court does not err in calling a witness.....	301
what evidence in prosecution for burning goods to injure an insurance company is admissible as tending to show guilty knowledge by defendant.....	302
meaning of section 6 of Venue act as to when party must apply for change of venue.....	417
when application for change of venue must show why it was not presented sooner.....	417
improper conduct of court officers will not amount to reversible error if not prejudicial.....	417
to charge the offense of an attempt to commit larceny the indictment must allege failure of the attempt.....	467
indictment for an attempt to commit larceny must allege the value of the property attempted to be stolen.....	467
attempt to steal from person of one who has nothing of value on his person capable of being stolen does not constitute a crime.....	467
right of self-defense extends to the killing, by a brother, of the assailant of his sister—when it is error to give an instruction stating correct rules.....	505
when right of self-defense revives in favor of the person who may be regarded as the assailant.....	505

## CROSS-ERRORS.

when a defendant whose petition for <i>certiorari</i> was denied cannot be allowed to assign cross-error on the record when the other defendant's petition is allowed.....	98
--	----

## DAMAGES.

when property owner is entitled to damages for vacation of streets and alleys.....	398
what provision in a contract is not a penalty but the measure of compensation in case of breach.....	539

## DEBTOR AND CREDITOR.

statement of "net results" rule as to preferences in bankruptcy proceedings—when charging off overdraft is not an unlawful preference.....	110
when satisfaction of note to bank is a preferential payment within prohibition of Bankruptcy act.....	110
if the interest of a child in the proceeds of the sale of land is contingent until distribution no assignment is valid if the child dies before that time.....	197

DEBTOR AND CREDITOR.—*Continued.*

PAGE.

stockholders of record in a bank are proper parties to a bill for a receiver.....	519
when issuing an execution does not bar <i>capias ad satisfaciendum</i> .....	558
judgment creditor in an action of tort is not required to make affidavit for <i>capias ad satisfaciendum</i> .....	558
section 62 of Judgments act construed.....	558
the expectancy of a prospective heir may be released to the ancestor or assigned to a stranger—effect of each—when assignee takes no interest.....	565

## DEDICATION.—See HIGHWAYS.

## DEEDS.

complainant has the burden of proving the allegations of his bill to set aside a deed.....	152
what is not undue influence in procuring deed—transactions occurring after delivery of deed do not affect validity of the delivery.....	152
when Supreme Court will not disturb chancellor's finding that deed was valid and well delivered.....	152
a building restriction in a deed will be construed in light of circumstances existing at execution—what is meant by "front" of a corner lot.....	164
what is not ground for relieving party from the burden of a building restriction.....	165
one who disregards injunction against violating building restriction acts at his peril.....	165
restrictions upon use of property are not favored—what is necessary to authorize a court of equity to enforce a personal covenant .....	337
what is not a covenant running with the land or one which a court of equity may specifically enforce.....	337
general rule as to delivery of a deed to third person for grantee—grantor's intention at time of delivery to third person controls.....	362
after valid delivery the grantor's change of mind has no effect—what is a sufficient acceptance of voluntary conveyance to stranger.....	362
a sale of land in accordance with an executed parol partition thereof conveys title.....	362
when delivery of a deed is not shown—when finding that grantor was competent to make deed will be upheld....	422
when defendant to bill to set aside deed is competent to testify for co-defendant.....	422

DEEDS.— <i>Continued.</i>	PAGE.
grantor's intention is without effect unless deeds are delivered—what amounts to parol partition.....	491
when parol partition may be decreed under general prayer for relief in a bill to set aside a will and deeds as clouds upon complainant's title.....	491
DEFENSES.—See ACTIONS AND DEFENSES.	
DELIVERY.—See DEEDS.	
DEMAND.	
a demand for an accounting is not a constituent part of the offense of embezzlement by an agent.....	256
DESCENT.	
the Statute of Escheats is part of the intestate laws of the State—what included in the intestate laws.....	275
DIRECTORS.—See CORPORATIONS.	
DIVORCE.	
neither the bill nor publication notice need give the full name of complainant—mistake in initial is not material.	73
DRAINAGE.	
when the court does not err in refusing to carry demurrer back to information—when a demurrer to pleas in <i>quo warranto</i> must be sustained.....	334
DRAM-SHOPS.—See LOCAL OPTION.	
EJECTMENT.	
when a party testifying in ejectment case should be permitted to testify to conversations—what makes a <i>prima facie</i> case in ejectment.....	376
when plaintiff in ejectment need not prove that the defendants sued were in possession.....	376
judgment in ejectment should not be in favor both of the executors and the heirs.....	376
when testimony taken in former trials in ejectment case is admissible.....	376
rules of law decided on former appeal in ejectment case will not be reconsidered.....	377
when a defendant in ejectment cannot insist that plaintiff should have proved title from the government.....	532



## ELECTIONS.

PAGE.

production of ballots for inspection of grand jury is not a violation of the secrecy of the ballot.....	205
court may require production of ballots where a violation of the City Elections act is charged.....	205
power of court to impound ballots.....	205
when substance of a proposition need not be printed on ballot for referendum election.....	519
when proposition need not be submitted in the form prescribed by section 16 of the Ballot law.....	519
construction of the referendum election provision of the Banking act of 1907.....	519
referendum provision of the Banking act of 1907 requires both alternatives upon the ballot.....	519

## EMBEZZLEMENT.

what is not sufficient proof to show embezzlement by an agent—mere proof of receipt of funds and failure to account is not sufficient.....	256
proof must show that agent fraudulently converted to his own use the funds received.....	256
where venue of an indictment for embezzlement should be laid—when demand is unnecessary.....	256

## EMINENT DOMAIN.

meaning of section 53 of Local Improvement act, providing for the condemnation of land.....	58
distinction between Eminent Domain act and Local Improvement act as to parties defendant to a condemnation proceeding .....	59

## EQUITABLE CONVERSION.

when will effects an equitable conversion of land.....	196
--	-----

## EQUITY.

what is not ground for relieving party from building restriction—one who violates injunction acts at his peril..	165
party seeking a re-sale of land should make an advance bid or guarantee against loss—what is not ground for setting aside sale.....	278
party alleging fraud in partition sale must state the facts relied upon—when sale of several tracts <i>en masse</i> will not be set aside.....	278
what necessary to authorize a court of equity to enforce a personal covenant.....	337

EQUITY.—*Continued.*

PAGE.

what is not a covenant running with the land nor one which a court of equity may enforce.....	337
when decree for specific performance of contract to convey may require execution of a deed containing a release of homestead.....	392
when court, in decreeing specific performance, may order defendants to furnish title guaranty policy.....	392
decree for specific performance should not leave compliance optional with the complainant.....	393
complainant is not entitled to credit for payment on costs which have not been properly taxed.....	393
when property owner is not entitled to injunction against vacating an alley—what should be considered where a mandatory injunction is asked for.....	398
facts stated in a contract which is made a part of a bill for specific performance control in case of allegations in the bill inconsistent therewith.....	459
when proposed vendors are not required to convey if proposed vendee objects to the title.....	459
when parol partition may be decreed under general prayer for relief in a bill to set aside a will and deeds as clouds upon complainant's title.....	491
court of equity cannot allow solicitor's fees to party filing a bill of interpleader, as the discretion in awarding costs must be confined to fees authorized by statute.....	529
rules applicable to specific performance apply to bill to enjoin breach of negative covenant.....	539
breach of negative covenant will not be enjoined if there is a want of mutuality—what provision of contract is measure of compensation in case of breach.....	539
when allowance of solicitor's fees on dissolution of temporary injunction is proper.....	539
effect of motion made at close of complainant's evidence to dismiss the bill for want of equity.....	573
when separate order granting leave for new parties to join as complainants is unnecessary.....	604
when the original complainant in a suit brought to enjoin the collection of taxes, cannot dismiss the same to the prejudice of others who have joined as complainants...	604

## ESCHEATS.

Inheritance Tax law applies to property of an intestate which escheats to the county—the Statute of Escheats is part of intestate laws of State.....	275
--	-----

## ESTOPPEL.

PAGE.

- what does not raise an estoppel against right of a State's attorney to collect legal fees..... 28
- when doctrine of equitable estoppel will be applied and the public be held bound by the apparent complete abandonment of an old highway..... 555

## EVIDENCE.

- genuineness of signature is not to be determined solely by comparison with one admitted to be genuine..... 72
- what evidence does not prove that party participated in a marriage ceremony ..... 72
- statements by deceased recognizing children as his are admissible against persons claiming as his heirs..... 72
- when no presumption is necessary in order to prove identity of applicant for marriage license..... 73
- certified transcript of testimony of subscribing witnesses on probate is admissible in circuit court in proceeding to contest a will..... 123
- what question as to undue influence is not proper—contestants cannot show that the testator had made a different will ..... 123
- when proper to show financial condition of the testator—rule as to beneficiary not an heir..... 123
- when proponent's proof offered in rebuttal is properly admitted—when admitting coroner's verdict as to cause of death is harmless..... 124
- question of existence of fiduciary relationship should be left to the jury..... 124
- complainant has the burden of proving the allegations of his bill to set aside a deed..... 152
- what is not undue influence in procuring deed..... 152
- transactions occurring after delivery of deed do not affect the validity of the delivery..... 152
- when Supreme Court will not disturb chancellor's findings. 152
- what is a confidence game and not merely a breach of contract—what evidence of other transactions is admissible to show guilty knowledge..... 173
- pleadings are admissible in evidence as are also admissions in the briefs of attorneys..... 234
- when admissions of attorneys are competent evidence—the admissions of attorneys which are general may be proved at a subsequent trial or in another case..... 234
- rule as to directing a verdict..... 235
- what evidence is incompetent to prove one guilty of receiving stolen property..... 244

EVIDENCE.—*Continued.*

	PAGE.
ownership of stolen property must be proved as alleged— what not sufficient proof of existence of corporation to sustain allegation of ownership.....	244
what does not show embezzlement by agent—proof must show that agent fraudulently converted to his own use the funds received.....	256
when a conviction for embezzling proceeds of the sale of bonds cannot be sustained.....	256
general rule as to the force of positive testimony of an unimpeached witness—when receipts given to an agent are admissible .....	256
what will not be assumed in a prosecution for receiving stolen property—what necessary to sustain a conviction on testimony of confessed thief.....	284
a witness cannot be impeached on an immaterial matter— what is immaterial in a prosecution for receiving stolen property .....	285
what circumstance tends to corroborate the testimony of prosecuting witness in a robbery case—when jury can not disregard testimony as to age of defendants.....	293
a variance between allegation and proof of ownership of goods in prosecution for burning goods to injure an in- surance company is not material.....	300
right of People in a criminal case to an instruction as to convicting upon circumstantial evidence.....	301
when court does not err in calling a witness.....	301
what evidence in prosecution for burning goods to defraud insurer is admissible to show guilty knowledge.....	302
when party testifying in an ejectment case should be per- mitted to testify to conversations—what makes a <i>prima</i> <i>facie</i> case in ejectment.....	376
when plaintiff in ejectment need not prove that defend- ants sued were in possession.....	376
when testimony taken in former trials in ejectment case is admissible.....	376
in absence of eye-witnesses to accident, proof of habitual caution by the deceased tends to raise a presumption of due care on his part.....	386
to authorize a recovery of damages from a street railway company for the killing of a child there must be some evidence of negligence by the defendant.....	386
parol evidence is not admissible to show that an alley va- cation ordinance was passed for private benefit.....	398
when delivery of a deed is not shown—when finding that grantor was competent to make deed will be upheld....	422

EVIDENCE.—*Continued.*

PAGE

when defendant to a bill to set aside a deed is competent to testify for her co-defendant.....	422
when record showing appointment of conservator is admissible as bearing on issue of mental capacity.....	429
when declaration of testator made after execution of will is admissible in evidence.....	429
what is necessary to establish title under section 1 of the Statute of Limitations—strong evidence is necessary to show adverse possession by co-tenant.....	437
what facts may be considered and what may be shown as bearing upon question of <i>laches</i> .....	438
when question of competency of witness is immaterial on appeal in an inheritance tax case.....	472
when books of account are competent evidence to prove claims against estate.....	472
when objection to testimony of witness as to what was shown by books is obviated.....	472
when defendant in ejectment cannot insist that plaintiff should have proved title from the government.....	532
what evidence not admissible to sustain a sheriff's deed based on sale under execution.....	532
elements essential to establish highway by prescription—effect where the proof shows an uninterrupted use by public for requisite period.....	573
when land owner must be presumed to have had knowledge that public use was under claim of right.....	574
when fact that attesting witnesses do not remember seeing testatrix sign will or that she acknowledged it as her act does not preclude probate of will.....	592
when error in admission of evidence is harmless.....	625

## EXECUTIONS.

transcript of judgment of justice of peace is the clerk's authority for issuing execution—what not admissible to sustain deed based on execution sale.....	532
when issuing execution on judgment does not bar right to <i>capias ad satisfaciendum</i> .....	558
a judgment creditor in an action of tort is not required to make affidavit for <i>capias ad satisfaciendum</i> .....	558

## EXECUTORS AND ADMINISTRATORS.

when power of sale by executor is not conditional on a request by the heirs to sell.....	196
--	-----

## EXPECTANCIES.—See REAL PROPERTY.

## FEES AND SALARIES.

PAGE.

act of 1907, which required State's attorneys to pay fees into county treasury, was unconstitutional.....	28
act of 1907, for payment of further compensation to State's attorney of Cook county, was unconstitutional.....	28
promise to perform duties of office for compensation other than that fixed by law is not enforceable—what does not raise estoppel against collecting fees.....	28
section 8 of Fees and Salaries act does not entitle State's attorney to fees not taxed as costs.....	28
when fines and penalties paid to clerk of court are "collected" by State's attorney.....	29
effect of act of 1911 as to fines and penalties for violations of park ordinances.....	29
section 8 of the Fees and Salaries act was not repealed by implication.....	29
proper disposition of interest received by clerk of court upon fines and penalties.....	30
a county treasurer is not entitled to separate compensation as supervisor of assessments.....	234

## FENCES.

the ownership, maintenance or control of a division fence is a purely statutory matter.....	324
what necessary to render person liable to contribute to repair of division fence.....	324
province of fence viewers is not limited to apportioning division fences for repair—section 11 of act relating to fences construed.....	324

## FORFEITURE.

difference, as to forfeiture, between estates upon condition subsequent and upon conditional limitation.....	134
--	-----

## FORMER CASES.

<i>Lyons v. Police Pension Fund</i> , 255 Ill. 139, followed, as to when an act is invalid as an amendment of an act by reference to its title only.....	28
<i>Northwestern University v. Village of Wilmette</i> , 230 Ill. 80, followed, as to rule that estimate for sewer need not specify cost of restoring pavement.....	59
<i>Illinois Central Railroad Co. v. Hasenwinkle</i> , 232 Ill. 224, followed, as to rule that a middle initial is not part of a name.....	73
<i>Stetson v. Stetson</i> , 200 Ill. 601, followed, as to what instrument will not revoke a former will.....	88

## FORMER CASES.—Continued.

PAGE.

<i>Sutton v. Chicago Railways Co.</i> 258 Ill. 551, distinguished, as to what determines amount of lien where party settles with client after notice of attorney's lien.....	94
<i>Footte v. Lake County</i> , 206 Ill. 185, followed, as to rule that county treasurer is not entitled to separate compensation as supervisor of assessments.....	234
<i>City Trust Co. v. Lee</i> , 204 Ill. 69, distinguished, as to the proper construction of condition of indemnity bond....	235
<i>Waugh v. Glos</i> , 246 Ill. 604, distinguished, as to when additional fees may be awarded in a proceeding for initial registration of title.....	331
<i>Funderburk v. Spengler</i> , 234 Ill. 574, followed, as to section 98 of Roads and Bridges act not authorizing road from two lots of land to a public road.....	371
<i>Hedrick v. Donovan</i> , 248 Ill. 479, adhered to, as to when a decree may require execution of a deed with release of homestead.....	392
<i>Entwistle v. Meikle</i> , 180 Ill. 9, and <i>In re Weedman's Estate</i> , 254 id. 504, distinguished, as to when record showing appointment of conservator is admissible.....	429
<i>Brizzolara v. Mosher</i> , 71 Ill. 41, followed, as to when proposed vendors are not required to convey if proposed vendee objects to the title.....	459
<i>Neiberger v. McCullough</i> , 253 Ill. 312, and <i>McAuliffe v. O'Connell</i> , 258 id. 186, explained, as to when it will be inferred that amendments were printed before the final passage of bill.....	478
<i>Chapin v. Dake</i> , 57 Ill. 295, followed, as to rule that court of equity cannot allow solicitor's fees to party filing a bill of interpleader.....	529
<i>Simpson v. Simpson</i> , 114 Ill. 603, explained, as to effect of an assignment of expectancy by heir presumptive...	565

## FORMER JEOPARDY.

arson and burning goods to injure an insurance company are distinct offenses, and an acquittal of charge of arson does not bar prosecution on other charge.....	301
---	-----

## FRAUD.

when act of county treasurer in retaining compensation does not amount to fraud.....	234
actual or positive fraud defined—condition of indemnity bond construed as limited to losses caused by an act of positive fraud or dishonesty.....	235

FRAUD.—*Continued.*

PAGE.

party alleging fraud must state the facts relied upon and not mere conclusions—when sale of land *en masse* will not be set aside..... 278

## HABEAS CORPUS.

power of circuit court to issue writ of *habeas corpus ad testificandum*—court cannot take custody of a convicted prisoner from warden..... 597  
 what cannot be considered on petition for *mandamus*.... 597

## HIGHWAYS.

section 98 of the Roads and Bridges act does not authorize road from two lots of land to a public road..... 371  
 the difference between common law and statutory dedication—effect where streets and alleys on statutory plat are vacated by ordinance..... 398  
 what does not affect the validity of vacation proceedings—parol evidence not admissible to show that alley vacation ordinance was passed for private benefit..... 398  
 when property owner is entitled to damages for vacating streets and alleys..... 398  
 when property owner is not entitled to injunction against vacating alley—what must be considered where a mandatory injunction is asked for..... 398  
 when abandonment of old road may be presumed—commissioners have the power to decide between relative advantages of two roads..... 555  
 when old road will be regarded as abandoned—when doctrine of equitable estoppel will be applied and public be held bound by apparent abandonment of road..... 555  
 what necessary to determination of question whether there is a highway by prescription—effect where proof shows uninterrupted use for requisite period..... 573  
 elements essential to establish highway by prescription—when nature of use and knowledge of land owner of such use may be inferred..... 573  
 whether acts of the public charge notice to land owner of their adverse character depends largely upon facts of particular case..... 573  
 when land owner must be presumed to have had knowledge that public use was under claim of right..... 574

## HOMESTEAD.

when decree for specific performance of contract to convey may require the execution of a deed with a release of homestead ..... 392



**HOMESTEAD.—Continued.****PAGE.**

- when leasing homestead premises is not an abandonment of homestead estate—when homestead is not abandoned though dwelling is destroyed by fire..... 584
- when householder need not account to heirs for insurance money on dwelling—section 7 of Exemptions act, as to homestead insurance, construed..... 584
- the value of homestead premises is to be determined as of the time of the allotment..... 585

**HOSPITALS.**

- issuing warrants against future hospital taxes is an incurring of indebtedness within meaning of the constitution. 249

**HUSBAND AND WIFE.**

- what evidence does not prove that party participated in a marriage ceremony..... 72
- statements by deceased recognizing children as his are admissible against persons claiming as heirs..... 72
- neither the bill for divorce nor the publication notice need give the full name of complainant..... 73
- when ante-nuptial contract does not show an engagement to marry—engagement to marry is necessary to create a confidential relation..... 342
- when ante-nuptial contract is not canceled—wife's assent to cancellation of ante-nuptial contract is necessary.... 342
- when ante-nuptial contract does not bar widow's award.. 342
- when Statute of Limitations does not run as between husband and wife..... 472

**IDEM SONANS.**

- a variance in spelling of names is not always material—when names are not *idem sonans*..... 331

**INDICTMENT.**

- ownership of property is a necessary averment of an indictment for receiving stolen property—in whom ownership of property must be alleged..... 244
- indictment may refer to stolen drug by its general name instead of its complete scientific name..... 244
- what is not sufficient proof of existence of corporation to sustain allegation of ownership..... 244
- what constitutes duplicity in a criminal pleading—what may be omitted from an indictment for receiving stolen property ..... 284

INDICTMENT.—*Continued.*

PAGE.

allegation of ownership of goods is not material in indictment for burning goods to injure insurer.....	300
to charge the offense of an attempt to commit larceny the indictment must allege failure of the attempt.....	467
indictment for an attempt to commit larceny must allege the value of the property attempted to be stolen.....	467

## INHERITANCE TAX.

the word "corporation," as used in the Inheritance Tax law, includes municipal corporations—nature of an inheritance tax.....	275
when inheritance tax accrues—Inheritance Tax law applies to property transferred to county by the Statute of Escheats.....	275
the Statute of Escheats is part of the intestate laws of the State—what is included in intestate laws.....	275
when question of competency of witness is immaterial on appeal in an inheritance tax case.....	472
when books of account are competent evidence to prove claim against estate.....	472
when objection to testimony of witness as to what was shown by books is obviated.....	472

## INJUNCTION.

one who disregards injunction against violating building restriction acts at his peril.....	165
when property owner is not entitled to injunction against vacating alley—what should be considered where mandatory injunction is asked for.....	398
rules applicable to specific performance apply to bill to enjoin breach of negative covenant.....	539
breach of negative covenant will not be enjoined if there is a want of mutuality.....	539
what provision of contract in case of breach is not a penalty but the measure of compensation.....	539
when allowance of solicitor's fees on dissolution of temporary injunction is proper.....	539
what necessary to determination of question whether there is a highway by prescription—effect where proof shows uninterrupted use for requisite period.....	573
when original complainant in a bill for injunction cannot dismiss the suit to prejudice of others who have joined as complainants.....	604

## INJURIES.—See NEGLIGENCE.

## INSOLVENCY.—See DEBTOR AND CREDITOR.

INSTRUCTIONS.	PAGE.
in will contest case the question of existence of fiduciary relationship should be left to the jury.....	124
instruction should not ignore undue influence where that is one of the principal grounds of contest.....	124
where execution of will is one of the grounds of contest it should not be assumed in instructions.....	124
when party is not entitled, on appeal, to complain of assumption of instructions.....	124
instruction should contain all elements necessary to warrant verdict where verdict is directed.....	124
when jury should not be told that executor is entitled to employ expert witnesses.....	124
instructions may be refused which are covered by others given—when instruction should not be refused although verbose and ill-drawn.....	244
when instruction stating rule with reference to secreting funds with intent to embezzle is improper.....	257
instructions should confine the jury to the evidence supporting the bill of particulars.....	257
a defendant on trial is entitled to an instruction as to the presumption of innocence—what will render an instruction objectionable.....	284
jury must be accurately instructed where chief witnesses are accomplices—when an instruction as to reasonable doubt is misleading.....	301
when an error in instructions cannot be disregarded—jury should not be told to consider the surrounding circumstances appearing on the trial.....	301
right of People to an instruction as to convicting upon circumstantial evidence.....	301
an instruction as to the effect of impeachment should not name the witness.....	376
correct instruction, if irrelevant to any issue in the case, ought not to be given.....	377
when it is not error to give instruction stating the ultimate test of mental capacity.....	453
it is not improper for instruction to tell jury what kind of influence is regarded as undue.....	453
what statement in instruction does not increase complainant's burden of proof.....	453
when it is error to give instructions in a criminal case even though they state correct rules of law.....	505

INSTRUCTIONS.—*Continued.* PAGE.

- when instruction defining nuisance should not be given—  
 when modification of an instruction as to water-closets  
 being nuisances is error..... 625

## INTEREST.

- proper disposition of interest received by clerk of court  
 upon fines and penalties claimed by different parties... 30

## INTERPLEADER.

- proper disposition of interest received by clerk of court  
 upon fines and penalties where a bill of interpleader is  
 filed to determine rights of claimants..... 30  
 court of equity cannot allow solicitor's fees to party filing  
 bill of interpleader, as the discretion in awarding costs  
 must be confined to fees authorized by statute..... 529

## INTOXICATING LIQUORS.—See LOCAL OPTION.

## JUDGMENTS AND DECREES.

- a judgment in ejectment should not be rendered in favor  
 both of the executors and the heirs..... 376  
 decree for specific performance should not leave compli-  
 ance optional with the complainant..... 393  
 complainant is not entitled to credit for payment on costs  
 not properly taxed..... 393  
 a judgment for money must specify precise sum in words  
 or figures—what not sufficient..... 532  
 transcript of judgment of a justice of peace is the clerk's  
 authority for issuing execution—what not admissible to  
 sustain deed based on execution sale..... 532  
 judgment creditor in action of tort is not required to make  
 affidavit for *capias ad satisfaciendum*..... 558  
 section 2 of act concerning judgments, decrees and exe-  
 cutions construed—when issuing execution does not bar  
*capias ad satisfaciendum*..... 558

## JUDICIAL SALES.

- party alleging fraud in partition sale must state the facts  
 relied upon—when sale of several tracts *en masse* will  
 not be set aside..... 278  
 at a partition sale the land cannot always be sold to best  
 advantage in separate tracts..... 278  
 party seeking re-sale should make an advance bid or guar-  
 antee against loss—what is not ground for setting par-  
 titition sale aside..... 278

## JURISDICTION.

PAGE.

- what fact does not affect jurisdiction of county court in  
an adoption proceeding..... 343

## LACHES.

- when *laches* cannot be imputed to the State—exceptions.. 213  
equity ordinarily follows law in barring claims by *laches*. 437  
what facts may be considered and what may be shown as  
bearing upon the question of *laches*..... 438

## LANDLORD AND TENANT.

- when the landlord is responsible for nuisance created and  
allowed to be maintained in building..... 625  
when removal of a nuisance is not considered as a repair  
of the premises..... 625  
when landlord should provide right of entry in the lease  
so as to remove nuisance..... 625  
when landlord is not entitled to notice to remove water-  
closet which has become a nuisance..... 625

## LAPSED LEGACIES.—See WILLS.

## LARCENY.

- to charge the offense of an attempt to commit larceny the  
indictment must allege failure of the attempt..... 467  
indictment for an attempt to commit larceny must allege  
the value of the property attempted to be stolen..... 467

## LIENS.

- effect of the Attorney's Lien law—what determines the  
amount of the lien where the person liable settles with  
claimant in full after notice..... 94

## LIMITATIONS.

- what is necessary to establish title under section 1 of the  
Statute of Limitations—strong evidence is necessary to  
show adverse possession by co-tenant..... 437  
when possession is not hostile in its inception—possession  
by co-tenant must amount to disseizin to be adverse.. 437  
co-tenants must be given notice in order to start running  
of the Statute of Limitations..... 437  
when Statute of Limitations does not run against prin-  
cipal and in favor of general investing agent..... 472  
when Statute of Limitations does not run as between hus-  
band and wife..... 472

## LOCAL OPTION.

PAGE.

- object of the Local Option act—effect of provision of section 8 of the Local Option act suspending the operation of ordinances..... 181
- a city in anti-saloon territory has power to pass prohibitory ordinance—what provision as to nuisances is not invalid ..... 181
- when ordinance applies to so-called clubs for distributing liquor to patrons..... 182
- Local Option act is directed not only to the business but to place of business of liquor seller..... 182
- city, though in anti-saloon territory, cannot prohibit posting of advertisements of liquor dealers..... 550

## MANDAMUS.

- requiring production of ballots for inspection of the grand jury is not a violation of secrecy of the ballot..... 205
- court may require production of ballots where a violation of the City Elections act is charged—power of court to impound ballots..... 205
- when doctrine of equitable estoppel will be applied and the public be held bound by the apparent complete abandonment of an old highway..... 555
- when petition for *mandamus* on relation of Attorney General need not make State's attorney a party..... 597
- what question cannot be considered on petition for *mandamus*—when effect of writ of *mandamus* is to expunge a void order of lower court..... 597
- what cannot be considered on a petition for *mandamus*... 597

## MARRIAGE.

- what evidence does not prove that party participated in marriage ceremony..... 72
- statements by deceased recognizing children as his are admissible against persons claiming as heirs..... 72
- when no presumption is necessary in order to prove identity of applicant for marriage license..... 73
- neither the bill for divorce nor the publication notice need give the full name of complainant..... 73

## MASTER AND SERVANT.

- what is an injury "arising out of and in the course of the employment," as meant by section 1 of the Workmen's Compensation act of 1911..... 479
- when verdict is not insufficient in not stating the amount of compensation and from whom recoverable..... 479

MUNICIPAL CORPORATIONS.—See SPECIAL ASSESSMENTS.

	PAGE.
manner in which city has acquired easement in land is not involved on application to confirm a special assessment for a sewer.....	58
how city may acquire easement for public street—right to construct sewer is included in easement for a street....	59
what does not render liquor ordinance invalid—effect of provision of section 8 of Local Option act suspending operation of ordinances.....	181
object of the Local Option act of 1907—city in anti-saloon territory may pass prohibitory ordinance.....	181
what provision of ordinance with reference to nuisances relating to liquor distribution to the members of alleged clubs is not invalid.....	181
what provision of liquor ordinance applies to clubs.....	182
Local Option act is directed not only to the business but to the place of business of liquor seller.....	182
amendment of 1913 to act relating to city hospitals which authorizes the pledging of future hospital taxes is not, in itself, unconstitutional.....	248
issuing warrants against future hospital taxes is "becoming indebted," within constitutional limitation against incurring indebtedness.....	249
the word "corporations," used in the Inheritance Tax law, includes municipal corporations.....	275
Inheritance Tax law applies to property transferred to a county by virtue of the Statute of Escheats.....	275
the difference between common law and statutory dedication—effect where streets and alleys shown on statutory plat are vacated by ordinance.....	398
what does not affect the validity of vacation proceedings—parol evidence not admissible to show that alley vacation ordinance was passed for private benefit.....	398
when property owner is entitled to damages for the vacation of streets and alleys.....	398
when property owner is not entitled to injunction against vacating alley—what should be considered where mandatory injunction is asked for.....	398
city, though in anti-saloon territory, cannot prohibit posting of advertisements of liquor dealers.....	550
city appropriation ordinance must cover miscellaneous receipts—city cannot, after first fiscal quarter, appropriate miscellaneous receipts for expenses.....	619
water-closets need not be detrimental to health in order to be nuisances.....	625

MUNICIPAL CORPORATIONS.—*Continued.* PAGE.

when ordinance need not define condition that shall be a nuisance—ordinance construed as to who is required to remove nuisance ..... 624

## MURDER.

right of self-defense extends to the killing, by a brother, of assailant of his sister..... 505  
when right of self-defense revives in favor of the person who may be regarded as the assailant..... 505

## NAMES.

neither the bill for divorce nor the publication notice need give the full name of complainant—middle initial is not part of a name..... 73  
a variance in spelling of names is not always material—when names are not *idem sonans*..... 331

## NEGLIGENCE.

in absence of eye-witnesses to accident, proof of habitual caution by the deceased tends to raise a presumption of due care on his part..... 386  
there must be some evidence tending to show negligence by defendant before a recovery can be had..... 386

## NOTICE.

neither the bill for divorce nor the publication notice need give the full name of complainant—middle initial is not part of a name..... 73  
when applicants for registration of title are not chargeable with notice of incumbrances..... 330  
a variance in spelling of names is not always material—what names are not *idem sonans*..... 331  
by-laws will not take place of a notice required by statute—what is necessary to a waiver of notice of meeting of stockholders..... 499  
mere presence of a stockholder at annual meeting is not, alone, sufficient to constitute waiver of notice..... 499

## NUISANCES.

when an ordinance need not define condition which shall be a nuisance—ordinance construed as to who shall remove nuisance..... 624  
when landlord is responsible for nuisance created and allowed to be maintained in building..... 625



### NUISANCES.—*Continued.*

PAGE.

when removal of nuisance is not to be considered as a repair of the premises.....	625
when landlord should provide right of entry in lease so as to remove nuisance—when landlord is not entitled to notice to remove nuisance.....	625
water-closets need not be detrimental to health in order to constitute nuisances.....	625
when modification of instruction as to water-closets being nuisances is not error.....	625

### ORDINANCES.

effect of provision of section 8 of Local Option act suspending the operation of ordinances.....	181
a city in anti-saloon territory has the power to pass prohibitory ordinance—what provision as to nuisances is not invalid .....	181
when ordinance applies to so-called clubs for distributing liquor to patrons.....	182
city, though in anti-saloon territory, cannot prohibit posting of advertisements of liquor dealers.....	550
city appropriation ordinance must cover miscellaneous receipts—city cannot, after first quarter, appropriate miscellaneous receipts to pay current expenses.....	619
when an ordinance need not define condition which shall be a nuisance—ordinance construed as to who shall remove nuisance.....	624
water-closets need not be detrimental to health in order to be nuisances .....	625

### PARENT AND CHILD.

what fact does not affect jurisdiction of county court in an adoption proceeding.....	343
---	-----

### PARTIES.

distinction between the Eminent Domain act and Local Improvement act as to the parties defendant to a condemnation proceeding.....	59
in a special assessment proceeding a mortgagee need not be named as an owner.....	59
stockholders of record in a bank are proper parties to a bill for a receiver.....	579
when petition for <i>mandamus</i> on relation of Attorney General need not make the State's attorney a party.....	597

## PARTITION.

PAGE.

party alleging fraud in partition sale must state the facts relied upon—when sale of several tracts <i>en masse</i> will not be set aside.....	278
at a partition sale the land cannot always be sold to best advantage in separate tracts.....	278
a party seeking re-sale should make an advance bid or guarantee against loss—what is not ground for setting aside the sale.....	278
a sale of land in accordance with an executed parol partition thereof conveys title.....	362
what is necessary to establish title under section 1 of the Statute of Limitations—strong evidence is necessary to show adverse possession by co-tenant.....	437
when possession is not hostile in its inception—possession by co-tenant must amount to a disseizin in order to become adverse.....	437
co-tenants must be given notice in some way in order to start running of Statute of Limitations.....	437
equity ordinarily follows law in barring claims for <i>laches</i> .....	437
what facts may be considered and what may be shown as bearing upon the question of <i>laches</i> .....	438
grantor's intention is without effect unless deeds are delivered—what amounts to parol partition.....	491
when parol partition may be decreed under general prayer for relief in a bill to set aside a will and deeds as clouds upon complainant's title.....	491
when leasing of homestead premises is not abandonment of homestead estate—when homestead is not abandoned though dwelling is burned.....	584
when householder need not account to heirs for insurance money on dwelling—section 7 of Exemptions act, as to homestead insurance, construed.....	584
value of homestead premises is determined as of the time of the allotment.....	585

## PLATS.

difference between a common law and statutory dedication—effect where streets and alleys shown on statutory plat are vacated by ordinance.....	398
what does not affect validity of vacation proceedings....	398

## PLEADING.

ownership of property is a necessary averment of an indictment for receiving stolen property—in whom ownership of property must be alleged.....	244
---	-----

PLEADING.—*Continued.*

PAGE.

indictment may refer to stolen drug by its general name instead of its complete scientific name.....	244
what constitutes duplicity in criminal pleading—receiving stolen property is a single offense though there are several owners of the property.....	284
what may be omitted from an indictment charging the offense of receiving stolen property.....	284
when court does not err in refusing to carry a demurrer back to information—when a demurrer to pleas in <i>quo warranto</i> must be sustained.....	334
facts stated in a contract which is made part of a bill for specific performance control in case of allegations in the bill inconsistent therewith.....	459
to charge the offense of an attempt to commit larceny the indictment must allege failure of the attempt.....	467
indictment for an attempt to commit larceny must allege the value of the property attempted to be stolen.....	467
when parol partition may be decreed under general prayer for relief in a bill to set aside a will and deeds as clouds upon complainant's title.....	491
when it will be presumed that issue was joined although there is no <i>similiter</i> in the record.....	535
when replication to a plea of <i>nul tiel</i> corporation amounts to plea of confession and avoidance.....	535

## POWERS.

when power of sale by executor is not conditional on request by heirs to sell—when a will effects an equitable conversion of land into personal property.....	196
---	-----

## PRACTICE.

section 61 of the Practice act, concerning propositions of law, construed—when section 61 of Practice act does not apply.....	72
when whole record is open for review without restriction to action on propositions of law.....	72
denial by Supreme Court of writ of <i>certiorari</i> is not an approval of Appellate Court's reasons for its judgment..	98
effect where two defendants file separate petitions for a writ of <i>certiorari</i> and only one is allowed—cross-error.	98
power of court to vacate leave to file information in the nature of <i>quo warranto</i> —what is meant by “probable ground” for granting leave.....	212
rule as to directing a verdict.....	235

PRACTICE.—*Continued.*

PAGE.

when an order granting leave to file an information in the nature of <i>quo warranto</i> should not be set aside on hearing of affidavits.....	213
rule as to proving admissions by attorneys—when pleadings and statements in briefs are admissible.....	234
the Supreme Court will not consider printed arguments of counsel couched in disrespectful language.....	421
questions raised for first time in reply brief will not be considered, neither will errors assigned but not argued.	429
if county court holds paving ordinance invalid it need not pass on objections arising only if ordinance were valid..	451
everything necessary to a consideration of the questions raised by appeal must appear in abstract of record....	451
objections to taxes are properly preserved for review if they are copied in the record—when right of objector to object to tax cannot be questioned on appeal.....	513
when it will be presumed that issue was joined although there is no <i>similiter</i> in the record.....	535
alleged error in ruling on pleadings is preserved for review without a bill of exceptions.....	535
in absence of bill of exceptions it will be presumed that evidence was sufficient to support judgment.....	535
a judgment creditor in action of tort is not required to make affidavit for <i>capias ad satisfaciendum</i> .....	558
effect of motion at close of complainant's evidence to dismiss the bill for want of equity.....	573
when petition for <i>mandamus</i> on relation of Attorney General need not make the State's attorney a party.....	597
when effect of a writ of <i>mandamus</i> is to expunge a void order, which is a proper province of the writ.....	597
when a separate order granting leave for new parties to join as complainants is unnecessary.....	604
when the original complainant cannot dismiss suit to the prejudice of others who have joined as complainants...	604
section 81 of Practice act construed as doing away with the necessity for formal exceptions, no matter by what method the evidence is preserved for review.....	608
stenographic report of trial should not contain judgment.	609

## PREFERENCES.—See DEBTOR AND CREDITOR.

## PRESCRIPTION.

what necessary to determination of the question whether there is a highway by prescription—effect where proof shows uninterrupted use for requisite period.....	573
---	-----

PREScription.— <i>Continued.</i>	PAGE.
elements essential to establish highway by prescription— when nature of use and knowledge thereof by the land owner may be inferred.....	573
when land owner must be presumed to have had knowl- edge that public use was under claim of right.....	574

PRESUMPTIONS.—See EVIDENCE.

PRINCIPAL AND AGENT.

what does not show embezzlement by agent—proof must show that agent fraudulently converted to his own use the funds received.....	256
when conviction for embezzling proceeds of sale of bonds cannot be sustained.....	256
when receipts given to agent are admissible on his trial for embezzlement.....	256
agent verbally authorized to find purchasers cannot make binding contract to sell land.....	381
when Statute of Frauds is a good defense to bill to spe- cifically enforce contract made by agent.....	381
when Statute of Limitations does not run against princi- pal and in favor of general investing agent.....	472
when Statute of Limitations does not run as to transac- tions between husband and wife.....	472

PUBLICATION.—See NOTICE.

PUBLIC OFFICERS.—See STATE'S ATTORNEYS.

QUO WARRANTO.

power of the court to vacate leave to file an information— discretion of court in granting leave and setting aside order is subject to review.....	212
leave to file an information in the nature of <i>quo warranto</i> is required in all cases—what is meant by “probable ground,” as used in Quo Warranto act.....	212
when granting leave to file information is proper.....	212
when order granting leave to file information should not be set aside on affidavits.....	213
when objection that information is based on matters not in the petition is not before the court for review.....	213
when <i>laches</i> cannot be imputed to the State—exceptions..	213
when the court does not err in refusing to carry demurrer back to an information—when demurrer to pleas must be sustained.....	334

## RAILROADS.

PAGE.

- when doctrine of equitable estoppel will be applied and the public be held bound by the apparent complete abandonment of an old highway..... 555

## REAL PROPERTY.—See DEEDS; WILLS.

- distinction between estate upon condition subsequent and upon conditional limitation—difference, as to forfeiture, between such estates..... 134
- transactions occurring after delivery of deed do not affect validity of the delivery..... 152
- building restriction in deed construed..... 164
- what is not ground for relieving a party from burden of building restriction contained in a deed..... 165
- the ownership, maintenance or control of a division fence is a purely statutory matter..... 324
- what necessary to render person liable to contribute to repair of division fence..... 324
- province of fence viewers is not limited to apportioning division fences for repair—section II of act relating to fences construed..... 324
- restrictions upon use of property are not favored—what is necessary to authorize a court of equity to enforce a personal covenant..... 337
- what is not a covenant running with the land nor one that a court of equity may specifically enforce..... 337
- after valid delivery of deed the grantor's change of mind has no effect—what is a sufficient acceptance of voluntary conveyance to stranger..... 362
- a sale of land in accordance with an executed parol partition thereof conveys title..... 362
- agent verbally authorized to find purchasers cannot make a binding contract to sell land..... 381
- the expectancy of a prospective heir may be released to ancestor or assigned to a stranger—effect of release by heir presumptive..... 565
- effect of assignment of an expectancy—when interest will not vest in assignee..... 565

## RECEIVING STOLEN PROPERTY.

- ownership of stolen property must be proved as alleged in an indictment for receiving it—in whom ownership of property must be alleged..... 244
- what not sufficient proof of existence of a corporation to sustain allegation of ownership..... 244

<b>RECEIVING STOLEN PROPERTY.—Continued.</b>		<b>PAGE.</b>
what evidence is incompetent to prove one guilty of receiving stolen property.....	244	
fact that there are several owners of the alleged stolen goods does not make the crime of receiving the goods other than a single offense.....	284	
what may be omitted in indictment for receiving stolen goods—what will not be assumed in prosecution for receiving stolen goods.....	284	
what is necessary in order to sustain a conviction on the testimony of a confessed thief.....	284	
a defendant in a criminal case is entitled to an instruction as to the presumption of innocence.....	285	
it is immaterial whether the defendant had purchased junk from the thief previous to the larceny involved.....	285	
 <b>REGISTRATION OF TITLE.</b>		
when applicants for registration of title are not chargeable with notice of incumbrances.....	330	
when additional fees may be awarded—decree should not be in favor of the registrar.....	330	
 <b>RELEASE.</b>		
the expectancy of a prospective heir may be released to the ancestor or assigned to a stranger—effect of each—when assignee takes no interest.....	565	
 <b>REPEAL.</b>		
section 8 of the Fees and Salaries act has not been repealed by implication.....	29	
repeals or amendments by implication are not necessarily prohibited by section 13 of article 4 of the constitution, concerning the titles of acts.....	248	
 <b>RES JUDICATA.</b>		
rules of law decided on a former appeal in an ejectment case will not be reconsidered.....	377	
 <b>REVOCATION.</b>		
what instrument will not revoke a former will—destruction of will revives a former will.....	88	
common law rule as to revocation of wills is in force in Illinois—revocation clause is ambulatory with remainder of the will.....	88	
a will is not revoked by a subsequent will which is too defectively executed to be probated.....	88	

## ROADS AND BRIDGES.—See HIGHWAYS.

## ROBBERY.

PAGE.

- rule as to reversal by Supreme Court for insufficient evidence—what circumstance tends to corroborate prosecuting witness in robbery case..... 293
- when jury cannot disregard testimony as to age of defendants—when error in sentencing defendants to reformatory cannot be corrected..... 293

## SALARIES.—See FEES AND SALARIES.

## SELF-DEFENSE.

- right of self-defense extends to the killing of an assailant by the brother of the person assailed..... 505
- when right of self-defense revives in favor of the person who may be regarded as the assailant..... 505

## SENTENCE.

- when error in sentencing defendants to reformatory can not be corrected by directing new sentence..... 293

## SIGNATURES.

- genuineness of signature is not to be determined solely by comparison with one admitted to be genuine..... 72

## SOLICITORS' FEES.

- court of equity cannot allow solicitor's fees to party filing bill of interpleader, as the discretion in awarding costs must be confined to fees authorized by statute..... 529
- when allowance of solicitor's fees on dissolution of temporary injunction is proper..... 539

## SPECIAL ASSESSMENTS.

- what property need not be included in a district for the construction of a sewer..... 58
- manner in which city has acquired easement in land is not involved on application to confirm a special assessment for a sewer..... 58
- effect where property is not described in resolution nor condemnation provided for in ordinance..... 58
- how city may acquire easement for public street—right to construct sewer is included in an easement for street.. 59
- in a special assessment proceeding a mortgagee need not be named as an owner..... 59



SPECIAL ASSESSMENTS.—*Continued.*

PAGE.

meaning of section 53 of the Local Improvement act—estimate for sewer need not specify the cost of restoring the pavement.....	58
distinction between Eminent Domain act and Local Improvement act as to parties defendant to a condemnation proceeding.....	59
paving ordinance should establish grade of large concrete culvert in the roadway.....	450
if county court holds an ordinance insufficient it need not pass on objections arising only if ordinance were valid.	451

## SPECIFIC PERFORMANCE.

what is necessary to authorize a court of equity to enforce a personal covenant.....	337
what is not a covenant running with the land nor one that a court of equity may specifically enforce.....	337
when Statute of Frauds is a good defense to bill to specifically enforce contract made by agent.....	381
when costs cannot be complained of on appeal.....	381
when decree for specific performance of contract to convey may require the execution of a deed with a release of homestead.....	392
when court, in decreeing specific performance, may order defendants to furnish title guaranty policy.....	392
decree for specific performance should not leave compliance optional with the complainant.....	393
complainant not entitled to credit for payment on costs not properly taxed.....	393
facts stated in a contract which is made part of a bill for specific performance control in case of allegations in the bill inconsistent therewith.....	459
when proposed vendors are not required to convey in case proposed vendee objects to the title.....	459

## SPEEDY TRIAL.—See TRIAL.

## STATE'S ATTORNEYS.

act of 1907, which required State's attorney to pay fees into county treasury, was unconstitutional.....	28
act of 1907, for payment of further compensation to the State's attorney of Cook county, was unconstitutional..	28
what does not raise an estoppel against right of a State's attorney to recover legal fees.....	28
section 8 of Fees and Salaries act does not entitle State's attorney to fees not taxed as costs.....	28

STATE'S ATTORNEYS.—*Continued.*

PAGE.

when fines and penalties paid to clerk must be regarded as "collected" by State's attorney.....	29
what suits for penalties should be prosecuted by State's attorney—presumption as to prosecution.....	29
effect of act of 1911 as to fines and penalties for violations of park ordinances.....	29
section 8 of the Fees and Salaries act was not repealed by implication .....	29

## STATUTE OF FRAUDS.

when Statute of Frauds is a good defense to bill to specifically enforce contract made by an agent.....	381
---	-----

## STATUTES.

repeals or amendments by implication are not necessarily prohibited by section 13 of article 4 of the constitution, concerning the titles of acts.....	248
what may be considered in determining intention of legislature—when the courts are not confined to the literal meaning of the words used.....	300
rule for construing a section of a statute—section 11 of act relating to fences construed.....	324
amendments to bills need not be read on three different days—amendments do not destroy identity of the act...	518
what is sufficient to show that a bill, with its amendments, was printed before final passage.....	518

## STOCKHOLDERS.

when corporation must look to its stock register to ascertain who are its stockholders—when assignee of stock becomes a stockholder.....	351
assignor is the legal owner of stock until the transfer is made on books of company.....	351
eligibility to be director follows legal ownership of stock—one to whom stock is transferred for express purpose of qualifying him as a director is eligible.....	351
by-laws will not take place of a notice required by statute—what is necessary to a waiver of notice of meeting of stockholders.....	499
what does not constitute participation in a meeting of stockholders .....	499
mere presence of a stockholder at annual meeting is not, alone, sufficient to constitute waiver of notice.....	499
stockholders of record in a bank are proper parties to a bill for a receiver.....	519

## STREET RAILWAYS.

PAGE.

- when leave to file information in nature of *quo warranto* against street railway company is properly granted on the showing made by the petition..... 212
- when order granting leave should not be set aside on the hearing of affidavits..... 213
- in absence of eye-witnesses to accident, proof of habitual caution by the deceased tends to raise a presumption of due care on his part..... 386
- to authorize a recovery for the killing of a child there must be some evidence tending to show negligence.... 386

## SURETIES.

- when decree against surety on county treasurer's bond is not conclusive as to liability on an indemnifying bond given to such surety..... 234
- what may be considered in construing condition of bond.. 234
- condition of indemnity bond construed..... 235

## TAXES.

- the Inheritance Tax law applies to property transferred to a county by virtue of the Statute of Escheats..... 275
- amount of road and bridge taxes must be certified to at meeting on first Tuesday in September..... 513
- what cannot be considered as an amendment of a certificate so as to validate tax..... 513
- under the act of 1913 the original certificates of levy must be filed with the county clerk..... 513
- objections to taxes are properly preserved for review on appeal if they are copied in the record..... 513
- when right of objector to object to tax cannot be questioned on appeal..... 513
- city appropriation ordinance must cover miscellaneous receipts—city cannot, after first fiscal quarter, appropriate miscellaneous receipts for expenses..... 619

## TOWNS.—See MUNICIPAL CORPORATIONS.

## TRIAL.

- admissions of attorneys during progress of trial are the admissions of their clients—admissions may be proved on another trial or in another action..... 234
- admissibility of pleadings and of statements in briefs.... 234
- rule as to directing a verdict..... 235
- when rule of former jeopardy does not apply..... 300

**TRIAL.**—*Continued.*

PAGE.

section 18 of division 13 of Criminal Code construed as to when a prisoner out on bail must be tried.....	300
when court does not err in calling a witness.....	301
meaning of section 6 of the Venue act as to when a party must apply for a change of venue.....	417
when application for change of venue must show why it was not presented sooner.....	417
improper conduct of court officers is not ground for re- versal if it is not prejudicial.....	417

**TRUSTS.**

when gift to charity is upon conditional limitation.....	134
what provision of will is intended to secure application of funds to specific purposes of bequests.....	135
when lapsed legacy does not pass under residuary clause..	135
when the allegation that a reasonable time has elapsed to carry out charitable bequest is unnecessary.....	135
when gifts to a charitable institution are for specific pur- poses and not for general investment.....	135

**UNDUE INFLUENCE.**

what question as to exercise of undue influence is not a proper one.....	123
instruction should not ignore undue influence where that is one of the principal grounds of contest.....	124
what is not undue influence in procuring deed.....	152
what statement in an instruction does not increase com- plainant's burden of proof.....	453

**VENUE.**

where venue of indictment for embezzlement by an agent should be laid.....	256
---	-----

**VERDICT.**

when verdict is not insufficient in not fixing the amount of compensation and stating from whom it is recoverable..	479
--	-----

**VILLAGES.**—See MUNICIPAL CORPORATIONS.**WAIVER.**

what is necessary to a waiver of notice of a meeting of stockholders .....	499
mere presence of a stockholder at annual meeting is not, alone, sufficient to constitute waiver of notice.....	499

## WILLS.

PAGE.

what instrument will not revoke a former will—destruction of will revives a former will.....	88
common law rule as to revocation of a will is in force in Illinois—revocation clause is ambulatory with remainder of the will.....	88
a will is not revoked by a subsequent will which is too defectively executed to be probated.....	88
certified transcript of testimony of subscribing witnesses on probate is admissible in circuit court in a proceeding to contest will.....	123
what question as to undue influence is not proper—contestants cannot show that the testator had made a different will.....	123
when proper to show financial condition of heirs of testator—rule as to beneficiary not an heir.....	123
when proponent's proof offered in rebuttal is properly admitted—when admitting coroner's verdict as to cause of death is harmless.....	124
question as to existence of fiduciary relationship should be left to the jury.....	124
instruction should not ignore undue influence where that is one of the principal grounds of contest.....	124
where execution of will is one of the grounds of contest it should not be assumed in instructions.....	124
instruction should contain all the elements necessary to warrant verdict where verdict is directed.....	124
jury should not be told that executor is entitled to employ expert witnesses.....	124
rules as to the vesting of devises of land apply, generally, to gifts of personal property—residuary clause must be kept in mind in construing a will.....	134
distinction between words of limitation and of condition..	134
distinction between estates upon condition subsequent and upon conditional limitation.....	134
difference, as to forfeiture, between estates upon condition subsequent and upon conditional limitation.....	134
when gift to charity is upon condition subsequent.....	134
what provision of a will is intended to secure the application of funds to specific purposes of bequests.....	135
general rule as to disposition of lapsed legacies—when a lapsed legacy will not pass under residuary clause.....	135
when gifts to charity are for a specific purpose.....	135
when power of sale by executor is not conditional on request by heirs to sell—when a will effects an equitable conversion of land into personal property.....	196

WILLS.—*Continued.*

PAGE.

when allegation that reasonable time has elapsed to carry out charitable bequest is unnecessary.....	135
if the interest of a child in the proceeds of sale of land is contingent no assignment thereof is valid if the child dies before the interest vests.....	197
when record showing appointment of conservator is admissible as bearing on issue of mental capacity.....	429
when declaration of testator made after execution of will is admissible in evidence.....	429
when it is not error to give instruction stating the ultimate test of mental capacity.....	453
it is not improper for instruction to tell jury what kind of influence is regarded as undue.....	453
what statement in instruction does not increase complainant's burden of proof.....	453
in Illinois a devise of land is revoked by a conveyance of the land by the testator during his lifetime.....	463
rights of legatees who are to receive proceeds of sale of land devised to trustee are extinguished by a sale of the land by the testatrix in her lifetime.....	463
when fact that attesting witnesses do not remember seeing testatrix sign the will or that she acknowledged it as her act does not preclude probate of will.....	592

## WITNESSES.

witness cannot be impeached on immaterial matter—what immaterial in prosecution for receiving stolen property.	285
when defendant to a bill to set aside a deed is competent to testify for her co-complainant.....	422

## WORDS AND PHRASES.

what is meant by "front" of corner lot, as used in building restriction contained in a deed.....	164
meaning of words "probable ground," as used in section 1 of Quo Warranto act.....	212
meaning of word "corporation," as used in the Inheritance Tax law.....	275

## WORKMEN'S COMPENSATION.

the Workmen's Compensation act of 1911 was regularly passed by the legislature.....	478
when injury is one "arising out of and in the course of the employment".....	479
when a verdict is not insufficient in not fixing amount of compensation and stating from whom it is recoverable..	479



# TABLE OF CASES

COMPRISING THE FORMER DECISIONS CITED, COMMENTED UPON OR  
EXPLAINED IN THIS VOLUME.

A	PAGE.
Abbott v. Beebe, 226 Ill. 417.....	284, 283
Abbott v. Hayes County, 78 Neb. 729.....	41
Abbott v. Territory of Oklahoma, 20 Okla. 119.....	318
Abrams v. Beale, 224 Ill. 496.....	494
Adams v. First M. E. Church, 251 Ill. 268.....	129
Adams v. Gordon, 265 Ill. 87.....	168
Africani Loan Ass'n v. Carroll, 267 Ill. 380.....	546
Aldrich v. People, 225 Ill. 610.....	245
Allen v. Shepard, 87 Ill. 314.....	283
Allison v. Clark, Breese, 348.....	397
Alschuler v. Schiff, 164 Ill. 298.....	348
Amboy, City of, v. Illinois Central R. R. Co. 236 Ill. 236.....	405
Anderson v. Smith, 159 Ill. 93.....	591
Argus Printing Co. <i>In re</i> , 1 N. Dak. 434.....	358
Armstrong v. Building Ass'n, 176 Ill. 298.....	462
Arnegaard v. Arnegaard, 41 L. R. A. (N. Dak.) 258.....	366
Ater v. Smith, 245 Ill. 57.....	497
Atlas Bank v. Nahant Bank, 23 Pick. 480.....	608
Attorney General v. Chi, and Ev. R. R. Co. 112 Ill. 520...232,	229
Avery v. Babcock, 35 Ill. 175.....	534

B	
Bacon v. Rives, 106 U. S. 99.....	476
Bacon v. Schepflin, 185 Ill. 122.....	486
Badenoch v. City of Chicago, 222 Ill. 71.....	36
Bailey v. People, 190 Ill. 28.....	554
Baird v. Shipman, 132 Ill. 16.....	628
Baker v. Baker, 202 Ill. 595.....	129
Baker v. People, 105 Ill. 452.....	538
Baldwin v. McClelland, 152 Ill. 42.....	538
Ball v. Palmer, 81 Ill. 370.....	445



	PAGE.
Ballance v. Frisby, 2 Scam. 63.....	272
Ballance v. Underhill, 3 Scam. 453.....	482
Barnes v. Johnston, 233 Ill. 620.....	204
Barney v. Chapman, 21 Fed. Rep. 903.....	564
Barry, <i>In re</i> Will of, 219 Ill. 391.....	132
Bartlett v. Board of Education, 59 Ill. 364.....	475
Bates v. Hacking, 28 R. I. 523.....	93, 92
Bates v. Williams, 43 Ill. 494.....	486
Battle Square Church v. Grant, 3 Gray, 142.....	144
Bauer v. Lumaghi Coal Co. 209 Ill. 316.....	546
Bickerdike v. City of Chicago, 185 Ill. 280.....	62
Billings v. People, 189 Ill. 472.....	277
Bishop v. Davenport, 58 Ill. 105.....	567
Bishop v. People, 200 Ill. 33.....	233
Black v. Jones, 264 Ill. 548.....	148, 147
Blackett v. Zeigler, 153 Iowa, 344.....	92
Blight v. Schneek, 51 Am. Dec. (Pa.) 478.....	366
Bolin v. Bolin, 245 Ill. 613.....	568
Bollnow v. Roach, 210 Ill. 364.....	435
Booth v. Prete, 81 Conn. 636.....	122, 117
Bowen v. Bowen, 265 Ill. 638.....	283
Boyd v. McConnell, 209 Ill. 396.....	531
Brechbeller v. Wilson, 228 Ill. 502.....	204
Bressler v. People, 117 Ill. 422.....	246
Brettmann v. Fischer, 216 Ill. 142.....	349
Brizzolara v. Mosher, 71 Ill. 41.....	462
Brooks v. Hatch, 261 Ill. 179.....	36
Browning v. State, 30 Miss. 656.....	319
Brushy Mound, Town of, v. McClintock, 150 Ill. 129.....	582
Bryan v. Wash, 2 Gilm. 557.....	368
Bryant v. Fissell, 86 Atl. Rep. 458.....	485
Buckingham v. Morrison, 136 Ill. 437.....	530
Burt v. Quisenberry, 132 Ill. 385.....	164
Butler v. Cornell, 148 Ill. 276.....	475
Butzow v. Kern, 264 Ill. 498.....	40

## C

Calleraud v. Piot, 241 Ill. 120.....	366
Campbell v. Campbell, 63 Ill. 502.....	530
Campbell v. People, 159 Ill. 9.....	317
Carle v. People, 200 Ill. 494.....	322
Carpenter v. Sherfy, 71 Ill. 427.....	534
Carper v. Crawl, 149 Ill. 465.....	142
Carson v. Davis, 171 Ill. 497.....	341
Carthage, City of, v. Munsell, 203 Ill. 474.....	554
Casper v. Kalt-Zimmers Manf. Co. 159 Wis. 517.....	359, 358

	PAGE.
Chapin v. Dake, 57 Ill. 295.....	531
Charter Gas Engine Co. v. Charter, 47 Ill. App. 36.....	504
Chicago, City of, v. Borden, 190 Ill. 430.....	581
Chicago, City of, v. Burcky, 158 Ill. 103.....	409
Chicago, City of, v. Chi., R. I. & P. Ry. Co. 152 Ill. 561.....	581
Chicago, City of, v. Galt, 224 Ill. 421.....	582
Chicago, City of, v. Gunning System, 214 Ill. 628.....	552
Chicago, City of, v. Nichols, 177 Ill. 97.....	623, 622
Chicago, City of, v. Sawyer, 166 Ill. 290.....	583
Chicago, City of, v. Union Building Ass'n, 102 Ill. 379.....	407
Chicago, City of, v. Union Ice Cream Co. 252 Ill. 311.....	185, 184
Chicago, City of, v. Walker, 251 Ill. 629.....	67, 66
Chicago, City of, v. Ward, 169 Ill. 392.....	414
Chicago, Rock Island and Pac. Ry. Co. v. Joliet, 79 Ill. 25....	415
Chicago, Rock Island and Pac. Ry. Co. v. Clark, 108 Ill. 113..	391
Chicago Teleph. Co. v. Northwestern Teleph. Co. 199 Ill. 324.	481
Chicago Terminal Transfer R. R. Co. v. Winslow, 216 Ill. 166.	379
Chilson v. People, 224 Ill. 535.....	180
Chisholm v. Bank of LeRoy, 176 Ill. App. 383.....	111
Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9.....	403
Cilley v. Hawkins, 48 Ill. 308.....	618
Cincinnati, Ind. and West. Ry. Co. v. People, 205 Ill. 538...	517
City Trust Co. v. Lee, 204 Ill. 69.....	239
Clafin v. City of Chicago, 178 Ill. 549.....	87
Clark v. Clark, 183 Ill. 448.....	366
Clark v. Jackson, 222 Ill. 13.....	444
Clark v. People, 224 Ill. 554.....	310
Clifton Manf. Co. v. U. S. Fidelity Co. 38 S. E. Rep. 790....	242
Climax Tag Co. v. American Tag Co. 234 Ill. 179.....	612
Cole v. Baker, 16 S. D. 1.....	476
Collins v. People, 98 Ill. 584.....	316
Collison v. Illinois Central R. R. Co. 239 Ill. 532.....	390
Columbia Theatre Co. v. Adsit, 211 Ill. 122.....	163
Commonwealth v. McDonald, 5 Cush. 365.....	471, 470
Commonwealth v. Tuckerman, 76 Mass. 173.....	272
Compton v. Johnson, 240 Ill. 621.....	449
Conductors' Benefit Ass'n v. Leonard, 166 Ill. 154.....	613
Conover v. Musgrave, 68 Ill. 58.....	284
Constant v. Matteson, 22 Ill. 546.....	530
Continental Bank v. Chicago T. and Tr. Co. 229 U. S. 435...	117
Conwell v. McCowan, 53 Ill. 363.....	530
Cook v. Gilmore, 133 Ill. 139.....	530
Cook v. Martyn, 2 Atk. 3.....	497
Cornelius v. Giberson, 25 N. J. L. 31.....	446
Corning & Co. v. Woolner, 206 Ill. 190.....	414
Corrington, <i>In re</i> , 124 Ill. 363.....	204

	PAGE.
Costly v. McGowan, 174 Ill. 76.....	454
Cotterell v. Coen, 246 Ill. 410.....	496
Crawford v. Burke, 201 Ill. 581.....	243, 239
Crerar v. Williams, 145 Ill. 625.....	146
Crozer v. People, 206 Ill. 464.....	327
Crum v. Sawyer, 132 Ill. 443.....	569
Cushman v. Bonfield, 139 Ill. 219.....	498
Cusack Co. v. City of Chicago, 267 Ill. 344.....	552

## D

Darst v. Swearingen, 224 Ill. 229.....	204
Daub v. Englebach, 109 Ill. 267.....	241
Davison v. People, 90 Ill. 221.....	274
Decker v. Hughes, 68 Ill. 33.....	327
DeGraff v. Manz, 251 Ill. 531.....	366
DeWitt v. Shea, 203 Ill. 393.....	446
Dickie v. Carter, 42 Ill. 376.....	164
Dixon v. People, 168 Ill. 179.....	132
Deerfield v. Connecticut River R. R. Co. 144 Mass. 325.....	582
DeWitt County v. City of Clinton, 194 Ill. 521.....	452
Donason v. Barbero, 230 Ill. 138.....	448, 444
Dorsey v. Dodson, 203 Ill. 32.....	146
Doss v. Bunyan, 262 Ill. 101.....	581
Dowie v. Sutton, 227 Ill. 183.....	456
Downing v. Mayes, 153 Ill. 330.....	445, 444
Duane v. City of Chicago, 198 Ill. 471.....	62
Duffy v. Duffy, 243 Ill. 476.....	428
Dulle v. Lally, 167 Ill. 485.....	487
Dunn v. Youmans, 224 Ill. 34.....	416
Dyas v. Dyas, 231 Ill. 367.....	57

## E

Earl v. City of Chicago, 136 Ill. 277.....	414
East Moline, Village of, v. Pope, 224 Ill. 386.....	254, 253
Eccleston v. Petty, Carth. 78.....	93
Eckhart v. Irons, 128 Ill. 568.....	340
Eddy v. Morgan, 216 Ill. 437.....	185
Edgar Collegiate Institute v. People, 142 Ill. 363.....	228
Eimer v. Eimer, 47 Ill. 373.....	530
Elgin v. People, 226 Ill. 486.....	312
Emory v. Keighan, 88 Ill. 482.....	70
England v. Fawbush, 204 Ill. 384.....	456
Entwistle v. Meikle, 180 Ill. 9.....	435
Erford v. City of Peoria, 229 Ill. 546.....	35
Ernst v. Mechanics and Metals Nat. Bank, 201 Fed. Rep. 664..	120
Ewertsen v. Gerstenberg, 186 Ill. 344.....	340

## F

## PAGE.

Fairman v. Peck, 87 Ill. 156.....	282
Feitler v. Dobbins, 263 Ill. 78.....	414
Ferris v. McClure, 40 Ill. 99.....	613
Finch v. Theiss, 267 Ill. 65.....	42
First Nat. Bank of Chicago v. Baker, 161 Ill. 281.....	614
Fitzgerald v. Allen, 240 Ill. 80.....	366
Flaherty v. McCormick, 123 Ill. 525.....	613
Flannigan v. Howard, 200 Ill. 396.....	349
Foote v. Lake County, 206 Ill. 185.....	237
Francis v. Wilkinson, 147 Ill. 370.....	164
Freeland v. People, 16 Ill. 380.....	288
Frye v. Partridge, 82 Ill. 267.....	171
Fulmer v. Commonwealth, 91 Pa. St. 503.....	288
Funderburk v. Spengler, 234 Ill. 574.....	375, 373
Furnace v. State, 153 Ind. 93.....	288

## G

Galbraith v. McLain, 84 Ill. 379.....	568
Gallagher v. People, 88 Ill. 335.....	307
Galpin v. City of Chicago, 249 Ill. 554.....	57, 56, 55, 48, 47
Gardner v. Meeker, 169 Ill. 40.....	241
Garwood v. Garwood, 244 Ill. 580.....	591
Gebhardt v. Reeves, 75 Ill. 301.....	416
Geisen v. Heiderich, 104 Ill. 537.....	35
Gillespie v. Smith, 29 Ill. 473.....	538, 282
Given v. Gould, 39 Me. 410.....	273
Gobble v. Linder, 76 Ill. 157.....	548
Golladay v. Knock, 235 Ill. 412.....	570
Goodhue v. People, 94 Ill. 37.....	273, 270
Gould v. Theological Seminary, 189 Ill. 282.....	596
Graves, <i>In re</i> Estate of, 242 Ill. 212.....	277
Gray v. People, 26 Ill. 344.....	316
Gray v. Town of Cicero, 177 Ill. 459.....	62
Greig v. Russell, 115 Ill. 483.....	462
Gross v. Village of Grossdale, 177 Ill. 248.....	87
Grubb v. Crane, 4 Scam. 153.....	482
Grundies v. Reid, 107 Ill. 304.....	332
Grundy v. Briggs, 1 Ch. Div. (1910) 444.....	358

## H

Haggerty v. Haggerty, 268 Ill. 295.....	283
Haines v. Danderine Co. 248 Ill. 259.....	613
Hair Co. v. Huckins, 5 C. C. A. 522.....	549
Hall v. First Nat. Bank, 133 Ill. 234.....	486
Hall v. Lance, 25 Ill. 250.....	70

	PAGE.
Haller Sign Works v. Training School, 249 Ill. 436.....	554
Hamlin v. Reynolds, 22 Ill. 207.....	618, 538
Hammer v. Johnson, 44 Ill. 192.....	590
Hankins v. People, 106 Ill. 628.....	184
Hardy v. Allegan Circuit Judge, 147 Mich. 694.....	549
Harrigan v. County of Peoria, 262 Ill. 36.....	282
Harris v. People, 218 Ill. 439.....	452
Harrison v. Pepper, 166 Mass. 288.....	590
Harvey v. County of Cook, 221 Ill. 76.....	526
Haward v. Peavey, 128 Ill. 430.....	204
Hayner v. People, 213 Ill. 142.....	273
Hays v. St. Paul M. E. Church, 196 Ill. 633.....	340
Heberer v. Heberer, 67 Ill. 253.....	283
Hedrick v. Donovan, 248 Ill. 479.....	396
Heffron v. Rice, 149 Ill. 216.....	531
Helm v. Webster, 85 Ill. 116.....	416
Hepler v. People, 226 Ill. 275.....	233
Heppes Co. v. City of Chicago, 260 Ill. 506.....	415
Herder v. People, 209 Ill. 50.....	297
Highway Comrs. v. Kinahan, 240 Ill. 593.....	557
Hirshfeld v. Fitzgerald, 157 N. Y. 166.....	608
Hobart v. Hobart, 154 Ill. 610.....	596
Hobbie v. Ogden, 178 Ill. 357.....	142
Hobson v. McCambridge, 130 Ill. 367.....	535
Hodges v. Crowley, 186 Ill. 305.....	253
Hogue v. Corbett, 156 Ill. 540.....	482
Holcomb v. Boynton, 151 Ill. 294.....	42
Hollingsworth v. Coal Co. 243 Ill. 98.....	35
Home Ins. Co. v. Swigert, 104 Ill. 653.....	481
Hopkins v. Snedaker, 71 Ill. 449.....	498
Hotchkiss v. National City Bank, 200 Fed. Rep. 287.....	121, 120
Howard v. Logan, 81 Ill. 383.....	588
Howe v. Hodge, 152 Ill. 252.....	146
Hoyne v. Danisch, 264 Ill. 467.....	617, 308, 55, 40
Hoyne v. Ling, 264 Ill. 506.....	40
Hoyt v. People, 140 Ill. 588.....	317
Hudnall v. Ham, 183 Ill. 486.....	569
Hudson v. Hudson, 222 Ill. 527.....	570
Hughes v. Carne, 135 Ill. 519.....	385
Hull v. Ensinger, 257 Ill. 160.....	204
Hurley v. Caldwell, 244 Ill. 448.....	435
Hutchinson v. Bambas, 249 Ill. 624.....	614
Hutchinson v. Hutchinson, 152 Ill. 347.....	530
Hutchinson v. Ulrich, 145 Ill. 336.....	340
Hyde Park, Village of, v. Borden, 94 Ill. 26.....	416

	PAGE.
Illinois Central R. R. Co. v. City of Bloomington, 167 Ill. 9...	581
Illinois Central R. R. Co. v. Hasenwinkle, 232 Ill. 224.....	87
Illinois Central R. R. Co. v. O'Keefe, 154 Ill. 508.....	454
Illinois Central R. R. Co. v. People, 143 Ill. 434.....	521, 185
Illinois Malleable Iron Co. v. Park Comrs. 263 Ill. 446.....	409

## J

Jaquith v. Alden, 189 U. S. 78.....	114
Jespersen v. Mech, 213 Ill. 488.....	591
Johnson v. County of Winnebago, 256 Ill. 276.....	211
Johnson v. Farrell, 215 Ill. 542.....	456
Johnson v. People, 197 Ill. 48.....	273
Johnson v. Preston, 226 Ill. 447.....	147
Joliet, City of, v. Alexander, 194 Ill. 457.....	253
Jones v. O'Connell, 266 Ill. 443.....	623, 237

## K

Kaenders v. Montague, 180 Ill. 300.....	164
Kane v. Mackellar, 109 N. Y. 215.....	476
Kellan v. Kellan, 258 Ill. 256.....	435, 129
Kelly v. People, 192 Ill. 119.....	316
Kennard v. Curran, 239 Ill. 122.....	271
Kerfoot v. Billings, 160 Ill. 563.....	282
Kern v. Meyer, 264 Ill. 560.....	129
Kershaw v. Kershaw, 102 Ill. 307.....	572, 568
Kesner v. Miesch, 204 Ill. 320.....	385
Kettering v. City of Jacksonville, 50 Ill. 39.....	187
Kiebel v. Leick, 216 Ill. 474.....	283
Kilgour v. Crawford, 51 Ill. 249.....	530
King v. Meiss, 3 T. R. 596.....	229
Kingsbury v. Burnside, 58 Ill. 310.....	368
Kinsella v. Stephenson, 265 Ill. 369.....	444
Kirby v. Kirby, 236 Ill. 255.....	445
Kitterman v. People, 181 Ill. App. 682.....	564
Knopf v. First Nat. Bank of Chicago, 173 Ill. 331.....	606
Koebel v. Doyle, 256 Ill. 610.....	576
Kohley, <i>In re</i> Estate of, 200 Ill. 189.....	596
Kossakowski v. People, 177 Ill. 563.....	272, 271
Krause v. Nolte, 217 Ill. 298.....	379
Kroell v. Kroell, 219 Ill. 105.....	350
Krome v. Halbert, 263 Ill. 172.....	308

## L

Lamb v. Ward, 114 N. C. 255.....	476
Lambert v. Hemler, 244 Ill. 254.....	444

	PAGE.
Lambert v. Wiltshire, 144 Ill. 517.....	562
Larrison v. Peoria, Atlanta and Decatur R. R. Co. 77 Ill. 11..	481
Larson v. Glos, 235 Ill. 584.....	271
Lasher v. Loeffler, 190 Ill. 150.....	349
Latimer v. Latimer, 174 Ill. 418.....	366
Laugel v. City of Bushnell, 197 Ill. 20.....	187
Lawrenceville, City of, v. Hennessey, 244 Ill. 464.....	62
Lee v. Mendel, 40 Ill. 359.....	87
Lee, Village of, v. Harris, 206 Ill. 428.....	415
Leslie, <i>In re</i> , 58 N. J. Eq. 609.....	359
Lewis v. King, 180 Ill. 259.....	436
Libby, McNeill & Libby v. Cook, 222 Ill. 206.....	243
Ligare v. Chicago, Madison and North. R. R. Co. 166 Ill. 249..	406
Ligare v. City of Chicago, 139 Ill. 46.....	406
Lightcap v. Bradley, 186 Ill. 510.....	70
Lilly v. Shaw, 59 Ill. 72.....	530
Lines v. Willey, 253 Ill. 440.....	160
Linn v. Linn, 261 Ill. 606.....	366
Litchfield and Madison Ry. Co. v. People, 225 Ill. 301.....	516
Little v. People, 157 Ill. 153.....	292
Lloyd v. Catlin Coal Co. 210 Ill. 460.....	416
London and Edin. Ship. Co. v. Brown, 42 Scottish L. R. 357..	484
Long v. Linn, 71 Ill. 152.....	482
Long v. Long, 118 Ill. 638.....	341
Long v. Morrison, 251 Ill. 143.....	448, 444
Longshore v. Longshore, 200 Ill. 470.....	568
Lorton v. State, 7 Mo. 55.....	288
Lory v. People, 229 Ill. 268.....	270
Loughton v. Atkins, 1 Pick. 535.....	93
Lovington, Township of, v. Adkins, 232 Ill. 510.....	274
Lyons v. Police Pension Fund, 255 Ill. 139.....	38, 37

## M

Madison, Township of, v. Gallagher, 159 Ill. 105.....	581
Maher, <i>In re</i> Estate of, 204 Ill. 25.....	380
Mai v. People, 224 Ill. 414.....	312, 310
Mansfield v. Wallace, 217 Ill. 610.....	283
Mason v. City of Chicago, 178 Ill. 499.....	62
Mason v. Truitt, 257 Ill. 18.....	591
Matthews v. Bedworth, 1 W. C. C. 124.....	484
Maxwell v. Harper, 98 Pac. Rep. (Wash.) 758.....	366
Mayhew v. City of Eugene, 104 Pac. Rep. 727.....	186
McAuliffe v. O'Connell, 258 Ill. 186.....	487, 481, 480
McAnrow v. Martin, 183 Ill. 467.....	531
McBride v. Hawthorne, 268 Ill. 456.....	588

	PAGE.
McChesney v. City of Chicago, 151 Ill. 307.....	538
McCormick v. Miller, 102 Ill. 208.....	161
McCreary v. Boston and Maine R. R. Co. 153 Mass. 300.....	582
McDonald v. People, 126 Ill. 150.....	274
McDowell v. People, 204 Ill. 499.....	452
McHarry v. Irvin, 85 Ky. 322.....	476
McIntosh v. Saunders, 68 Ill. 128.....	613
McMahill v. Torrence, 163 Ill. 277.....	448, 444
McNally v. O'Brien, 88 Ill. 237.....	326
Mead v. Trustees Presbyterian Church, 229 Ill. 526.....	596
Mechanics and Metals Nat. Bank v. Ernst, 231 U. S. 60.....	121
Mercer County v. Wolff, 237 Ill. 74.....	412
Merlo v. Coal and Mining Co. 258 Ill. 328.....	54
Meyer v. Village of Teutopolis, 131 Ill. 552.....	411, 405
Miller v. Fisher, 111 Md. 93.....	628
Miller v. People, 229 Ill. 376.....	296
Mills v. Davison, 54 N. J. Eq. 659.....	144
Moore v. City of Chicago, 261 Ill. 56.....	415
Moore v. Flynn, 135 Ill. 74.....	368
Morrison v. Tyler, 266 Ill. 308.....	148, 147, 146
Mott v. Danville Seminary, 129 Ill. 403.....	144
Mt. Carmel, City of, v. Shaw, 155 Ill. 37.....	404
Mullinix v. People, 76 Ill. 211.....	274
Murphy v. Chi., Rock Isl. and Pac. Ry. Co. 247 Ill. 614... 412,	404
Musham v. Musham, 87 Ill. 80.....	446

## N

Nagel v. People, 229 Ill. 598.....	310, 288
Nason v. Letz, 73 Ill. 371.....	614
National Bank v. Millard, 10 Wall. 152.....	116
National City Bank v. Hotchkiss, 231 U. S. 50.....	121
Neiberger v. McCullough, 253 Ill. 312. 490, 489, 488, 487, 482, 480	
Nelson v. Swanson, 186 Ill. App. 632.....	564
Newberry v. Blatchford, 106 Ill. 584.....	380
Newell v. Cleve., Cin., Chi. and St. L. Ry. Co. 261 Ill. 505... 390	
Newell v. Sass, 142 Ill. 104.....	414
New Haven Clock Co. v. Kochersperger, 175 Ill. 383.....	172
New York Nat. Bank v. Massey, 192 U. S. 142.. 122, 120, 118, 116	
Nichols v. Commonwealth, 78 Ky. 180.....	288
Nieman v. Wintker, 85 Ill. 468.....	538
Noel v. People, 187 Ill. 587.....	524
Noon, <i>In re</i> , 115 Wis. 299.....	92
North v. Graham, 235 Ill. 178.....	144, 142
Northern Trust Co. v. Buck & Rayner, 263 Ill. 222.....	277
Northwestern University v. Village of Wilmette, 230 Ill. 80... 71	



	PAGE.
<b>O</b>	
O'Connell v. Chicago Terminal R. R. Co. 184 Ill. 308.....	582
Oehler v. Levy, 234 Ill. 595.....	627
Osborn v. Farwell, 87 Ill. 89.....	239
Otis v. Gardner, 105 Ill. 436.....	357
Ottumwa, City of, v. City Water Supply Co. 119 Fed. Rep. 315.....	255
Owners of Lands v. People, 113 Ill. 296.....	527

<b>P</b>	
Parker v. Catholic Bishop, 146 Ill. 158.....	413, 412, 411, 404
Parker v. Richland County, 214 Ill. 165.....	237
Parsons v. Ely, 45 Ill. 232.....	568
Patterson v. Lilly, 90 N. C. 82.....	476
Pavlicek v. Roessler, 222 Ill. 83.....	350
Peabody v. Burri, 255 Ill. 592.....	448, 444
People v. Anderson, 239 Ill. 266.....	335, 336, 231
People v. Barkas, 255 Ill. 516.....	318
People v. Baskin, 254 Ill. 509.....	322, 246
People v. Bertsche, 265 Ill. 272.....	180
People v. Board of Police, 75 N. Y. 38.....	41
People v. Bowman, 247 Ill. 276.....	488
People v. Bowman, 253 Ill. 234.....	237
People v. Brady, 262 Ill. 578.....	523, 522, 481, 487
People v. Brander, 244 Ill. 26.....	245
People v. Brown, 67 Ill. 435.....	230
People v. Burns, 212 Ill. 227.....	231
People v. Cairo, Vincennes and Chi. Ry. Co. 265 Ill. 634.....	516, 54
People v. Campbell, 234 Ill. 391.....	274
People v. Chicago, Burl. and Quincy R. R. Co. 231 Ill. 112....	74
People v. Chicago, Burl. and Quincy R. R. Co. 266 Ill. 63....	515
People v. Chicago and Eastern Illinois R. R. Co. 214 Ill. 190..	517
People v. Cincinnati, Lafayette and Chi. Ry. Co. 256 Ill. 280..	482
People v. City of Chicago, 261 Ill. 16.....	554
People v. City of Rock Island, 215 Ill. 488.....	557
People v. Cleminson, 250 Ill. 135.....	322
People v. Covitz, 262 Ill. 514.....	316
People v. Cregier, 138 Ill. 401.....	187
People v. Cronkrite, 266 Ill. 438.....	270
People v. Crossley, 261 Ill. 78.....	252, 36
People v. Darrough, 266 Ill. 506.....	225
People v. Davidson, 240 Ill. 191.....	299
People v. Depew, 237 Ill. 574.....	180
People v. Election Comrs. 221 Ill. 9.....	37
People v. Feinberg, 237 Ill. 348.....	317
People v. Florville, 207 Ill. 79.....	622

	PAGE.
People v. Flynn, 265 Ill. 414.....	327
People v. Fryer, 266 Ill. 216.....	245
People v. Gary, 196 Ill. 310.....	231
People v. Gerold, 265 Ill. 448.....	273
People v. Golden Rule, 114 Ill. 34.....	232, 231,
People v. Gordon, 133 Cal. 328.....	272
People v. Harris, 263 Ill. 406.....	316
People v. Healy, 230 Ill. 280.....	233
People v. Heidelberg Garden Co. 233 Ill. 290.....	232
People v. Henning Co. 260 Ill. 554.....	481
People v. Hinrichsen, 161 Ill. 223.....	185
People v. Illinois Central R. R. Co. 265 Ill. 429.....	515
People v. Johnson, 81 Mich. 573.....	288
People v. Jones, 242 Ill. 138.....	35
People v. Kankakee and Southwestern R. R. Co. 218 Ill. 588..	516
People v. Keigwin, 256 Ill. 264.....	231
People v. Knopf, 183 Ill. 410.....	35
People v. Law and Order Club, 203 Ill. 127.....	194
People v. Liedecker, 258 Ill. 395.....	297
People v. Lihme, 269 Ill. 351.....	603
People v. Loeffler, 175 Ill. 585.....	35
People v. Lyons, 168 Ill. App. 396.....	236
People v. Mackey, 255 Ill. 144.....	231, 226
People v. McBride, 234 Ill. 146.....	527, 35
People v. McElroy, 248 Ill. 574.....	622
People v. McGinnis, 234 Ill. 68.....	321
People v. McWeeney, 259 Ill. 161.....	523
People v. Miller, 127 Pac. Rep. 228.....	186
People v. Milwaukee Avenue State Bank, 230 Ill. 505.....	520
People v. Myers, 256 Ill. 529.....	526
People v. Newberry, 87 Ill. 41.....	482
People v. Olsen, 222 Ill. 117.....	523
People v. People's Gas Light Co. 205 Ill. 482.....	225
People v. Petit, 266 Ill. 628.....	602
People v. Poindexter, 243 Ill. 68.....	180
People v. Pullman Car Co. 175 Ill. 125.....	231, 230
People v. Rardin, 255 Ill. 9.....	322
People v. Read, 261 Ill. 502.....	622
People v. Rendleman, 250 Ill. 289.....	231
People v. Robinson, 64 Cal. 373.....	358
People v. Rosenberg, 267 Ill. 202.....	319
People v. Roth, 249 Ill. 532.....	52
People v. Schnepf, 179 Ill. 305.....	231
People v. Shedd, 241 Ill. 155.....	231
People v. Smith, 253 Ill. 283.....	297
People v. Spira, 264 Ill. 243.....	315

	PAGE.
People v. Steinhauer, 248 Ill. 46.....	192
People v. Stowers, 254 Ill. 588.....	297
People v. Terrell, 262 Ill. 138.....	321
People v. Toledo, St. Louis and West. R. R. Co. 249 Ill. 175..	515
People v. Toledo, St. Louis and West. R. R. Co. 266 Ill. 112..	514
People v. Toledo, St. Louis and West. R. R. Co. 267 Ill. 142..	514
People v. Town of Thornton, 186 Ill. 162.....	226
People v. Union Consolidated El. Ry. Co. 263 Ill. 32..	226, 225, 214
People v. VanBever, 248 Ill. 136.....	36
People v. Wallace, 70 Ill. 680.....	522
People v. Walsh, 96 Ill. 232.....	482
People v. Wieboldt, 233 Ill. 572.....	413, 404
People v. Williams, 91 Ill. 87.....	613
People v. Wright, 70 Ill. 388.....	35
People v. Wyman, 102 Cal. 552.....	267
People v. Young, 237 Ill. 196.....	195
Peoria and Rock Island Ry. Co. v. Mitchell, 74 Ill. 394.....	420
Peotone, Village of, v. Illinois Central R. R. Co. 224 Ill. 101..	581
Phelps v. Conover, 25 Ill. 309.....	282
Phillippe v. Clevenger, 239 Ill. 117.....	466
Pierson v. People, 204 Ill. 456.....	452
Pinkney v. Weaver, 216 Ill. 185.....	548
Pirie v. Chicago Title and Trust Co. 182 U. S. 444.....	121
Podolski v. Stone, 186 Ill. 540.....	271
Princeville, Village of, v. Auten, 77 Ill. 325.....	414
Pulbrook v. Richmond Consolidated Min. Co. 9 Ch. Div. 610..	358
Purdy v. People, 140 Ill. 46.....	321

## Q

Quick v. Collins, 197 Ill. 391.....	283
Quigley v. Breckenridge, 180 Ill. 627.....	283
Quock Ting v. United States, 140 U. S. 417.....	270

## R

Rankin v. Rankin, 216 Ill. 132.....	498
Rees v. Thomas, 1-4 W. C. C. 9.....	484
Reuter v. Stuckart, 181 Ill. 529.....	447, 444
Reynolds v. Wetzler, 254 Ill. 607.....	385
Rickart v. People, 79 Ill. 85.....	195, 194
Rider v. People, 110 Ill. 11.....	316
Rieker v. City of Danville, 204 Ill. 191.....	531, 69
Riggs v. Girard, 133 Ill. 619.....	446
Riggs v. Jennings, 248 Ill. 584.....	52
Rivard v. Walker, 39 Ill. 413.....	368
Riverside, Village of, v. MacLain, 210 Ill. 308.....	414
Robbins v. Butler, 24 Ill. 387.....	241

	PAGE.
Roby v. Chicago Title and Trust Co. 194 Ill. 228.....	531
Rockford Ins. Co. v. Nelson, 65 Ill. 415.....	590
Rogers v. Tyley, 144 Ill. 652.....	386
Ross v. Mead, 5 Gilm. 171.....	282
Rouse v. Thompson, 228 Ill. 522.....	39
Rowlett v. Moore, 252 Ill. 436.....	90
Rucker v. Maddox, 114 Ga. 899.....	476
Ruhrstrat v. People, 185 Ill. 133.....	554
Rutland Marble Co. v. Ripley, 10 Wall. 339.....	547, 546

## S

Sanitary District of Chicago v. Met. El. Ry. Co. 241 Ill. 622..	557
Sanitary District of Chicago v. Ray, 199 Ill. 63.....	527
Sargent v. Roberts, 265 Ill. 210.....	164
Saunders v. City of Chicago, 212 Ill. 206.....	415, 414, 408
Schmidt v. Mitchell, 101 Ky. 570.....	358
Schmitt v. Weber, 239 Ill. 377.....	535
Schofield v. Thomas, 236 Ill. 417.....	74
School Directors v. School Directors, 135 Ill. 464.....	35
Schultz v. People, 210 Ill. 196.....	246
Schulz v. Hasse, 227 Ill. 156.....	283
Sears v. Vaughan, 230 Ill. 572.....	456
Seaverns v. Lischinski, 181 Ill. 358.....	614, 298
Selleck v. Selleck, 107 Ill. 389.....	476
Sellers v. Greer, 172 Ill. 549.....	341
Shea v. Murphy, 164 Ill. 614.....	366
Sheldon v. Hoyne, 261 Ill. 222.....	524
Shepherd v. Shepherd, 108 Mich. 82.....	476
Sherman v. Crosby, 11 Johns. 70.....	273
Siegel v. People, 106 Ill. 89.....	191
Simpson v. Simpson, 114 Ill. 603.....	572, 571
Smith v. Boston, 7 Cush. 254.....	409
Smith v. Newland, 40 Ill. 100.....	613
Smith v. Roath, 238 Ill. 247.....	584, 583
Smith v. State, 92 Ala. 30.....	319
Smith v. State, 59 Ohio St. 350.....	288
Smith v. Young, 160 Ill. 163.....	414
Snydacker v. Village of West Hammond, 225 Ill. 154.....	65, 62
Sontag v. Bigelow, 142 Ill. 143.....	448, 444, 370, 369
South Park Comrs. v. Ward & Co. 248 Ill. 299.....	414
South Shore Country Club v. People, 228 Ill. 75.....	195, 194
Southern Fire Brick Co. v. Garden City Sand Co. 223 Ill. 616..	548
Spears v. People, 220 Ill. 72.....	312
Squires v. Summers, 85 Ind. 253.....	366
Standidge v. Chicago Railways Co. 254 Ill. 524.....	96
Starkie v. Richmond, 155 Mass. 188.....	417

	PAGE.
State v. City of Elizabeth, 54 N. J. L. 462.....	405
State v. Cooper, 13 N. J. L. 361.....	311
State v. Essex Club, 53 N. J. L. 99.....	194
State v. Ferris, 42 Conn. 560.....	358
State v. Illinois Central R. R. Co. 246 Ill. 188.....	482
State v. Larson, 85 Iowa, 659.....	288
State v. Leete, 16 Nev. 242.....	359
State v. Mickel, 23 Utah, 507.....	288
State v. Mjelde, 29 Mont. 490.....	288
State v. Nelson, 29 Me. 329.....	288
State v. New, 22 Minn. 76.....	272
State v. Newton, 42 Vt. 537.....	288
State v. Porter, 26 Mo. 201.....	272
State v. Sampson, 157 Iowa, 257.....	310
State v. Tompkins, 32 La. Ann. 620.....	272
Steinau v. Cincinnati Gaslight and Coke Co. 48 Ohio St. 324..	549
Stephens v. Hoffman, 263 Ill. 197.....	377
Stetson v. Stetson, 200 Ill. 601.....	94, 93, 92, 91
Stevenson v. Lewis, 244 Ill. 147.....	414
St. John v. Quitzow, 72 Ill. 334.....	415
St. Lawrence Steamboat Co., <i>In re</i> , 44 N. J. L. 529.....	360
Stodalka v. Novotny, 144 Ill. 125.....	396
Stollery v. Cicero and Proviso Street Ry. Co. 243 Ill. 290....	390
Strawn v. Strawn, 46 Ill. 412.....	530
Strong v. Doty, 32 Wis. 381.....	144
Studley v. Boylston Nat. Bank, 229 U. S. 523.....	122, 117
Sullivan v. Atchison, Top. and Santa Fe Ry. Co. 251 Ill. 108..	416
Sullivan v. Atchison, Top. and Santa Fe Ry. Co. 262 Ill. 317..	436
Sullivan v. City of Oneida, 61 Ill. 242.....	554
Sullivan v. People, 156 Ill. 94.....	299
Sullivan v. People, 224 Ill. 468.....	350
Sutton v. Chicago Railways Co. 258 Ill. 551.....	96
Sutton v. English and Col. Produce Co. 2 Ch. Div. (1902) 502.	358
Swanson v. City of Ottumwa, 59 L. R. A. 620.....	255
Swigart v. City of Chicago, 223 Ill. 371.....	526

## T

Tawas and B. C. R. R. Co. v. Circuit Judge, 44 Mich. 479....	549
Tayloe v. Thompson's Lessee, 5 Pet. 358.....	562
Taylorville, City of, v. Stafford, 196 Ill. 288.....	511
Teasley v. Bradley, 110 Ga. 497.....	476
Thayer v. Star Mining Co. 105 Ill. 540.....	397
Thomas v. Miller, 161 Ill. 60.....	570
Thompson v. Bulson, 78 Ill. 277.....	327
Thompson v. Calhoun, 216 Ill. 161.....	164
Title and Trust Co. v. City of Chicago, 162 Ill. 505.....	62

	PAGE.
Toledo, St. Louis and K. C. R. R. Co. v. Bailey, 145 Ill. 159..	391
Tomle v. Hampton, 129 Ill. 379.....	628
Tomlin v. Hilyard, 43 Ill. 300.....	370, 369
Tomlinson v. Bank of Lexington, 76 C. C. A. 400.....	118, 117
Toof v. City Nat. Bank of Paducah, 124 C. C. A. 118.....	122, 117

## U

Ulrey v. Keith, 237 Ill. 284.....	546
United States v. Howard, 3 Sum. 12.....	310

## V

Vale v. People, 161 Ill. 309.....	321
Valter v. Blavka, 195 Ill. 610.....	164
VanSant v. Rose, 260 Ill. 401.....	171
VanValkenburg v. Trustees of Schools, 66 Ill. 103.....	282
Voight Brewing Co. v. Holtz, 168 Mich. 552.....	547

## W

Wabash R. R. Co. v. People, 202 Ill. 9.....	255
Wabash, St. Louis and Pac. Ry. Co. v. Binkert, 106 Ill. 298..	616
Wadsworth v. Duncan, 164 Ill. 360.....	241
Wahle v. Reinbach, 76 Ill. 322.....	631, 627
Waidner v. Pauly, 141 Ill. 142.....	274
Walker v. Converse, 148 Ill. 622.....	498
Walls v. Ritter, 180 Ill. 616.....	494
Ward v. Ward, 174 Ill. 432.....	282
Waters v. People, 104 Ill. 544.....	288
Waugh v. Glos, 246 Ill. 604.....	333
Weber v. Christen, 121 Ill. 91.....	494
Webster case, 5 Cush. 295.....	317
Weedman's Estate, <i>In re</i> , 254 Ill. 504.....	435
Welty v. Jacobs, 171 Ill. 624.....	546
Wetzel v. Firebaugh, 251 Ill. 190.....	456, 435
White v. Harris, 206 Ill. 584.....	446
White v. Morrison, 11 Ill. 361.....	613
White v. Murland, 71 Ill. 250.....	420
Whitcotton v. St. Louis and Hannibal Ry. Co. 250 Mo. 624..	97
Whittemore v. People, 227 Ill. 453.....	242
Wiggins Ferry Co. v. People, 101 Ill. 446.....	517
Wild & Co. v. Provident Life and Trust Co. 214 U. S. 292....	114
Wilenou v. Handlon, 207 Ill. 104.....	494
Williams v. People, 166 Ill. 132.....	292
Willoughby v. Lawrence, 116 Ill. 11.....	340
Wilson v. Clayburgh, 215 Ill. 506.....	530
Wilson v. Ford, 190 Ill. 614.....	283
Wilson v. State, 45 Texas, 76.....	288

	PAGE.
Winterbottom v. Pattison, 152 Ill. 334.....	368
Wistrand v. People, 213 Ill. 72.....	298
Wohlford v. People, 148 Ill. 296.....	274
Wood v. Graves, 144 Mass. 365.....	241
Woods v. Evans, 113 Ill. 186.....	341
Wooters v. Joseph, 137 Ill. 113.....	535
Wragg v. Penn Township, 94 Ill. 11.....	184
Wright v. Highway Comrs. 150 Ill. 138.....	374

## Y

Yess v. Yess, 255 Ill. 414.....	132
---------------------------------	-----

## Z

Zirngibl v. Calumet Dock Co. 157 Ill. 430.....	446, 445
--	----------

















